Petition

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 81-1798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY V. MUKO, INC.,

Petitioner,

v.

SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, LONG JOHN SILVER'S INC., AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PITTSBURGH, PENNSYLVANIA AND VICINITY,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
At Nos. 81-1696, 1697, 1698

PETITION FOR WRIT OF CERTIORARI

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March 26, 1982

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The petitioner, Larry V. Muko, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 25, 1982.

QUESTION PRESENTED FOR REVIEW

Should an agreement by which a non-labor party and two trade councils, who represent all construction craft and trade unions in the relevant market, refuse to deal with all non-union contractors including petitioner, entered into outside the non-statutory labor exemption and in violation of Section 8(e) of the National Labor Relations Act, be judged by the *per se* standard of antitrust analysis?

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The Opinion of the Court of Appeals, not yet officially reported, appears in the Appendix hereto. The Opinion is unofficially reported at 109 LRRM 2469, 1982-1 Trade Cas, P64,505 and 93 CCH Lab. Cas. P13,324. No opinion was rendered by the District Court for the Western District of Pennsylvania.

JURISDICTION

The judgment of the Court of Appeals for Third Circuit was dated and entered on January 25, 1982. A timely petition for rehearing and suggestion of rehearing en banc was denied on February 17, 1982, with three judges voting to grant said petition. This petition for certiorari is filed within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1 provides as follows:

> §1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §158(e) provides that:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4) (B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor

working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in District Court

This is an action against two labor councils and a restaurant chain for damages suffered as a result of defendants' violation of Section 1 of the Sherman Act, 15 U.S.C. §1. Original jurisdiction was vested in the District Court under 28 U.S.C. §1337.

B. Statement of Facts

Larry V. Muko, Inc.* ("Muko") is a non-union general contractor experienced in constructing fast-food restaurants and who built the first two restaurants in the Pittsburgh area for Long John Silver's, Inc. ("Silvers"), a national chain of fast-food restaurants. Silvers' employees do not construct restaurants but rather construction contracts are awarded by Silvers' to independent general contractors.

The Southwestern Pennsylvania Building and Construction Trades Council and the Building and Construction Trades Council of Pittsburgh, Pennsylvania, and Vicinity ("Councils") are labor organizations as defined by the National Labor Relations Act. 29 U.S.C. §152(5) The Councils represent unions that perform construction in Allegheny County, Pennsylvania and in a five county area surrounding Allegheny County. Neither Council represented the employees of Muko or Silvers. In fact, the Councils admit that they have no interest in and never made any attempt to organize Silvers' employees. As a result, no collective bargaining relationship exists between Silvers and either Council or any of their affiliated unions.

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*Muko has no parent company, subsidiary, or affiliate.

On August 29, 1973, Silvers' first restaurant in the Pittsburgh area was opened. At this time the Councils began handbilling the restaurant for the purpose of notifying the public that it had been built by a non-union contractor. The said handbilling lasted approximately two to three days.

Approximately two weeks after the handbilling ceased, Muko and Silvers executed a construction contract for the second Silvers' restaurant in the Pittsburgh area. Prior to this time, the President of Silvers' had told Muko that it could construct all the chain's restaurants in Western Pennsylvania if it continued to offer high-quality work and competitive prices.

However, because of Silvers' concern of new picketing and handbilling at the second restaurant, Silvers' requested a meeting with the Councils. On November 1, 1973 a meeting between Silvers and the Councils took place. At that meeting the Councils took the position that all restaurants must be built with union labor regardless of the wages and working conditions of non-union contractors. As a result, an agreement was reached that, in consideration of the Councils refraining from informational picketing and leafleting at either of Silvers' restaurants, Silvers' would use, for all restaurants yet to be constructed, contractors with whom Council local unions had collective bargaining agreements. By a letter dated November 7, 1973, Silvers confirmed the agreement reached on November 1, 1973.[1]

After the meeting, Silvers asked Muko if it would build as a union contractor. It refused to do so, and subsequently was not asked to bid on any further jobs for

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1. A copy of the entire letter dated November 7, 1973, is reproduced in the Appendix.

Silvers. All subsequent construction was performed by union contractors who on the whole were not able to construct restaurants as quickly as Muko, a critical factor to Silvers. All subsequent construction was performed by union contractors. Prior to the said agreement, Silvers' policy was to award construction contracts without regard to whether a contractor was union or non-union. After the agreement, Silvers in its bid application requested contractors to specifically indicate whether they were union or non-union.

At the close of all the evidence on liability, the District Court submitted the following special interrogatories to the jury:

> 1. Did Long John Silvers and the Trade Councils enter into an agreement or combination to refuse to grant construction contracts to non-union builders, including Muko?
>
> Answer: YES____ NO____
>
> If your answer to question 1. is NO, go no further, If your answer to question 1. is YES, go on to question 2.
>
> 2. Was the effect of the agreement between Long John Silvers and the Trade Councils to impose a restraint on free competition beyond that which would follow from the elimination of competition based on wage rates and working conditions?
>
> Answer: YES____ NO____
>
> If your answer to question 2. is NO, go no further. If your answer to question 2. is YES, go on to question 3.
>
> 3. Was the agreement between Long John Silvers and the Trade Councils an unreasonable restraint of

trade under the standards given you by the court in its instructions?

Answer: YES____ NO____

If your answer to question 3. is NO, go no further. If your answer to question 3. is YES, go on to question 4.

4. Did the agreement between Long John Silvers and the Trade Councils cause injury to the plaintiff in his business or property?

Answer: YES____ NO____

The jury returned its verdict, answering "Yes" to Interrogatories 1 and 2 and "No" to Interrogatory 3.

With respect to the third interrogatory, the District Court denied Muko's request that instructions be given on the traditional *per se* antitrust standard for judging the reasonableness of any agreement found. In place of the requested *per se* instructions, the District Court instructed the jury that it should judge any agreement it found to be outside the labor exemption to the antitrust laws, by a rule of reason standard. Under the standards set forth by the Court, a finding was made that the agreement was not an unreasonable restraint of trade.

Muko's Motion For New Trial, based upon the erroneous standards given the jury to answer interrogatory 3 was denied.[2] A panel of the Court of Appeals for the Third Circuit, with one judge dissenting, affirmed and ordered that judgment be entered for Silvers and the Councils. Muko's petition for rehearing was denied, with three judges voting to grant said petition.

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2. A copy of the Memorandum Order of the District Court denying Muko's Motion for New Trial is reproduced in the Appendix.

REASONS FOR GRANTING THE WRIT

I. The Proper Standard Of Antitrust Analysis By Which Exclusionary Agreements, Entered Into Outside The Labor Exemption And In Violation Of Federal Labor Policy Are Judged Is An Important Question Of Federal Law Which Should Be Settled By This Court.

The decision of the Court of Appeals reflects the necessity of this Court determining whether an agreement violative of federal labor policy, specifically §8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §158(e), satisfies the criteria for invoking the *per se* standard of antitrust analysis as set forth in *Nat'l Society of Professional Eng'rs. v. United States*, 435 U. S. 679, 692 (1978):

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality-they are "illegal *per se*", ...

In recent years, this Court has defined the parameters of the non-statutory labor exemption from the federal antitrust laws. *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U. S. 616 (1975). It has also indicated that finding a violation of federal labor law policy, specifically §8(e) of the National Labor Relations Act, is necessary to determine whether an agreement is immune from the antitrust laws. *Kaiser Steel Corp. v. Mullens*, ___ U. S. ___, 50 LW 4152, 4155 (No. 80-1345, Jan. 13, 1982). Presently, before the Court is another case involving the interplay between the antitrust laws and the labor laws. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 648

F.2d 527 (9th Cir. 1980), *cert. granted*, 50 LW 3528 (No. 81-334, Jan. 11, 1982).

Since the Court has not had occasion to address itself to the issue of the proper standard of antitrust analysis that should be applied to exclusionary agreements entered into outside the non-statutory labor exemption and in violation of federal labor law in conjunction with the above cases, there are compelling reasons why some definitive guidelines should now be marked by this Court. Efforts by labor unions to obtain agreements to exclude non-union contractors or contractors not in agreement with a specific labor union from a portion of the available work are of increasing occurrence, especially in today's economy, and both litigants and lower courts need the assistance of this Court in understanding the relationship between the two competing federal policies.

The effect of the decision of the Court of Appeals is to permit labor organizations and a non-labor party to justify exclusionary agreements outside the non-statutory labor exemption, on the grounds that the restraint was limited, that it did not completely destroy the business of the excluded contractor, that the unions were only attempting to insure the payment of prevailing wages, and that the competitive position of the non-labor party was enhanced. To permit such an application of the rule of reason analysis after it has already been determined that the anticompetitive aspects of the restraint outweigh any legitimate labor consideration relative to the non-statutory labor exemption, only invites a finding that exclusion of a small businessman has little economic impact, a finding which is contrary to the focus of the rule of reason and the Sherman Act. *Nat'l. Society of Professional Eng'rs. v. United States*, 435 U. S. 679, 688

(1978); *Klor's Inc. v. Broadway Hale Stores, Inc.*, 354 U. S. 207, 213-214 (1959).

But more importantly, it opens the field of antitrust inquiry in a case involving labor organizations to arguments for the advancement of labor policy which have clearly been rejected by Congress. In fact, Congress has made the policy decision that the activities of labor organizations, such as those found by the jury in the instant case, should be illegal because of their adverse economic impact.

In early 1947, the Senate Committee on Labor and Public Welfare held hearings on proposals to amend the National Labor Relations Act of 1935. Senator Taft submitted the Senate Committee's Report which expressed concern about the adverse economic effects of certain labor practices, especially secondary boycotts and jurisdictional disputes "which have seriously interferred with commerce and unduly impinged on the rights of individual employees, employers and the public." S. Rep. No. 105, 80th Cong., 1st Sess. at 7 (1947). The adverse economic effects of these practices were recognized by Senator Taft when he wrote, "the power of labor unions is being used indiscriminately against small businessman, and he is quickly forced to capitulate by danger of bankruptcy." *Id.* at 54.

During the Senate debates Senator Taft, the sponsor of the Senate Bill, spoke about the bad effects of secondary boycotts. On June 23, 1947, he said:

> In this bill we prohibit secondary boycotts all over this country. There have been secondary boycotts in which a union has said, "We will not handle the goods of manufacturer X because we do not like the men who make his particular goods"; and in many

> cases where a manufacturer had a union certified to him—perhaps a CIO union—an AFL union has boycotted it, or vice versa. All over the country such things have occurred. *I know that in my own State, small manufacturers have absolutely been driven out of their business and have been destroyed by unions far off from their concern, unions in which they had no interest whatsoever.*

93 Cong. Rec. 7690-7691 (1947) (emphasis added).

During the twelve years after the enactment of the Taft-Hartley Amendments it appeared that section 8(b)(4) did not effectively deal with the activities it was designed to prohibit, i.e., labor unions had been taking advantage of loopholes within the language of the section by entering into exclusionary agreements by peaceful means. *Cf. Carpenters' Union v. NLRB*, 357 U. S. 93 (1958). The congressional response to this abuse by labor organizations was the 1959 enactment of Section 8(e) of the NLRA, which prohibited such exclusionary agreements even when entered into by peaceful means. *National Woodwork Manufacturers Association v. NLRB*, 386 U. S. 612, 634 (1967). Congressional discussions in 1959 like those in 1947, indicated the Congress' awareness of the adverse economic impact caused by the activities proscribed in Section 8(b)(4) and Section 8(e).

During the House debate on June 15, 1979, Representative Hiestand discussed the effects of secondary boycotts proscribed by 8(b)(4):

> The principle of secondary boycotts is to strangle the employer by cutting him off from vital customers, services or distributors. The business groups manipulated by such tactics usually have no personal interest in the particular case. But the full pressure of the

> union is exerted upon them to cease transactions with the firm under attack. In effect, the economic activities of these businesses selected by the union management to fit into the strangulation scheme are curtailed for no reason or choosing of their own.

105 Cong. Rec. H9841 (daily ed. June 15, 1959).

Moreover, because of the adverse economic impact, the intent of Congress to apply a "per se" standard of illegality to violations of Section 8(e) was made clear by Representative Goldwater's remarks on October 2, 1959:

> This [Section 8(e)] means that such contractual clauses are per se illegal. It is unlawful for either party even to execute such an agreement, to insist that the other party bargain about or enter into it, to use any form of coercion or restraint—economic or otherwise—to compel the other party to enter into it or to live up to it even if his refusal to do so is in breach of a voluntary agreement to abide by the agreement, and finally, such breach does not constitute a good cause of action in a suit at law to recover damages for the breach or to secure specific performance of the agreement.

105 Cong. Rec. A8523 (daily ed. October 2, 1959).

While it is recognized that Representative Goldwater's remarks were not made in an antitrust context, they surely evidence congressional findings that such agreements have no redeeming value. It thus would surely be incongruous to hold that agreements which Congress has found to have no redeeming value and to have severe adverse economic consequences, could be judged under any standard other than the traditional *per se* test. A contrary conclusion could only result in the

creeping monopolization condemned in *Klor's* and by Congress.

From the antitrust perspective, the decision of the Court of Appeals restricts the application of the *per se* rule to "attempts by competitors to exclude horizontal competitors", a holding which the Third Circuit admits this Court has not confronted directly. In fact, while this Court has held that boycotters and the ultimate target need not be in a competitive relationship in order to find an "organized boycott", it has expressly left open the question as to whether the *per se* rule applies to all organized boycotts. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U. S. 531, 542 n. 14 (1978).

The answer to this question becomes extremely important in antitrust cases involving labor organizations. In a technical sense, it can be argued that a labor organization is not a competitor of a non-union general contractor. However, from a practical view of the marketplace, labor organizations and non-union contractors must be viewed as strong adverse competitive forces. If labor organizations are able to succeed in limiting construction work available to non-union labor, then union workers and union contractors will have gained a significant competitive advantage, the exact type of exclusionary conduct for economic benefit which merits *per se* treatment. 3 P. Areeda & D. Turner, *Antitrust Law*, §836, at 351-352 (1978). It is in fact, the classic case which caused the term "boycott" to first enter the lexicon of antitrust law. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U. S. 531, 541-542 (1978).

The important interplay of federal antitrust and labor policy as well as the economic conflict between labor organizations and non-union contractors justify the grant of certiorari to review the judgment below.

II. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Proper Standard Of Antitrust Analysis Which Should Be Applied To Exclusionary Agreements Outside The Non-Statutory Labor Exemption.

In *Consolidated Express Inc. v. New York Shipping Assn., Inc.*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, ___ U. S. ___, 100 S. Ct. 3040 (1980), *on remand*, 641 F.2d 90 (3d Cir. 1981), the Third Circuit per Judge Gibbons held that the *per se* rule of antitrust analysis is applicable to exclusionary agreements entered into outside the non-statutory labor exemption and in violation of federal labor policy. The reasoning of Judge Gibbons was as follows:

> [O]nce a court has concluded that the labor exemption does not shield anticompetitive conduct, application of the rule of reason is redundant. The justification offered for application of the rule of reason is the need to recognize, in the antitrust context, labor's legitimate interest in the collective bargaining process. That interest, however, is precisely the same one that must be taken into account in determining the scope of the non-statutory labor exemption. A holding that the exemption does not apply embodies a judgment that considerations of labor policy are outweighed by the anticompetitive dangers posed by the challenged restraint. The proposed use of the rule of reason would, therefore, simply be an invitation to the court or jury to reweigh under a different label the question of the nonstatutory exemption.

Id. at 523-524.

Yet in its decision below, the Court of Appeals rejects the reasoning of Judge Gibbons, one of the judges who voted to grant Muko's petition for rehearing, and holds that the rule of reason analysis should be applied even though the jury found an agreement, the effect of which was to restrain competition beyond that which would follow from the elimination of competition based on wages and working conditions. In so holding, the Third Circuit has not only rendered a decision in conflict with one of its own prior opinions, but has also adopted a position clearly in conflict with the Sixth Circuit.

As in *Consolidated Express*, the Sixth Circuit held in *South-East Coal Company v. Consolidated Coal Company*, 434 F.2d 767, 775 (6th Cir. 1970), *cert. denied*, 402 U. S. 983 (1971), that "when a labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint under the antitrust laws." *See also, Morse Bros. Inc. v. Int'l. Union of Operating Eng'rs.*, 1974-2 Trade Cases §75,412 (D. Oregon 1974). To make the conflict more complete, while the Third Circuit has held in this case that the exclusionary agreement reached does not constitute a group boycott meriting *per se* analysis the Ninth Circuit has indicated that such agreements should be treated similar to concerted refusals to deal or group boycotts to which the *per se* rule does apply. *California State Council of Carpenters v. Associated General Contractors of California, Inc.*, 648 F.2d 527 (9th Cir. 1980) *cert. granted* ___ U. S. ___, 50 LW 3528 (No. 81-334, Jan. 11, 1982).[3]

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3. Compare, *Berman Enterprises, Inc. v. Local 333, International Longshoremen's Assoc.*, 644 F.2d 930, 936 (2d Cir. 1981), *cert. denied*, ___ U. S. ___ 102 S. Ct. 506 (concluding without discussion that rule of reason analysis

These conflicts justify the grant of certiorari to review the judgment below.

III. The Decision Below Is In Conflict With The Applicable Decisions Of This Court And Is Erroneous.

The Court of Appeals gives four reasons for refusing to apply the *per se* standard of antitrust analysis to the exclusionary agreement found by the jury: (1) "neither Silvers nor the Trades Councils was in competition with each other or with Muko"; (2) "the 'refusal to deal' in this case involved only one relatively small buyer: Silver's"; (3) "the agreement did not have the necessary effect of destroying Muko's business"; and (4) "procompetitive effects were demonstrated—Silver's gained a position in the otherwise crowded Pittsburgh area fast food market". None of these grounds justify the decision of the Court of Appeals and each conflicts with the decisions of this Court.

Taking each reason seriatum, this Court has held that the boycotters and the ultimate target need not be in a competitive relationship with each other since boycotts are not a unitary phenomenon. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U. S. 531, 543 (1978). Rather the concept of boycott "refers to a method of pressuring a party with whom one has a dispute by withholding or enlisting others to withhold, patronage or services from the target." *Id.* at 541. Under such circumstances, this Court has held unlawful *per se*, concerted refusals to deal where no competitor of the target is involved. *Id.* at 543; *Paramount Famous Corp. v. U. S.*, 282 U. S. 30 (1930).

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would be applicable); *Commerce Tankers Corp. v. National Maritime Union of America*, 553 F.2d 793, 802 (2d Cir. 1977), *cert. denied* 424 U. S. 923 (substantial question as to whether *per se* approach is proper).

Similarly, this Court has rejected the concept that the *per se* rule should apply only to widespread concerted refusal to deal. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). On the contrary, this Court has stated of a concerted refusal to deal that,

> [I]t is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.

Id. at 213. The instant restraint goes much further than *Klor's*. Contrary to the suggestion of the Third Circuit, the jury found the restraint to be directed to all "non-union builders, including Muko".

No decision of this Court has required a showing that the target of a concerted refusal to deal be destroyed before the *per se* rule could be invoked. On the contrary, this Court has sanctioned the use of the *per se* rule where the only purpose of the restraint was aimed at influencing the seemingly unfair trade practices of boycott victims. *Fashion Originator's Guild of America v. Federal Trade Commission*, 312 U. S. 457 (1941).

Finally, this Court has specifically held that "the antitrust laws were enacted for the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488 (1977). Yet, the Third Circuit reasons that a restraint in the construction industry should be measured by the rule of reason analysis because "Silvers gained a position in the otherwise crowded Pittsburgh-area fast food market." No evidence was offered to show procompetitive effects in the fast food market, a market separate and distinct from the

construction market. The self-interest of Silvers is not synonymous with "pro-competitive effect." *Nat'l. Society of Professional Engr's. v. United States*, ___ U. S. ___, 98 S. Ct. 1355, 1364-1365 (1978). Even more compelling is this Court's rejection of the premise that a procompetitive effect in one market will excuse an anticompetitive effect in another. *Catalano Inc. v. Target Sales, Inc.*, 446 U. S. 643, 100 S. Ct. 1925, 1927 n. 8 (1980); *United States v. Topco Associates, Inc.*, 405 U. S. 596, 609-611 (1972); *United States v. Philadelphia National Bank*, 374 U. S. 321, 370 (1963).

Since the decision below conflicts with the applicable decisions of this Court, the grant of certiorari to review the judgment below is justified.

CONCLUSION

Muko's petition provides this Court with the opportunity to enunciate the proper standard of antitrust analysis that should be applied to an exclusionary agreement entered into outside the non-statutory labor exemption and in violation of specific federal labor law policy. For all the reasons described herein, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

March 26, 1982

Respectfully Submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1696, 1697, and 1698

LARRY V. MUKO, INC.,
Appellant in No. 81-1696

v.

SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL AND LONG JOHN SILVER'S, INC., BUILDING COUNCIL OF PITTSBURGH, PA. & VICINITY
Southwest Building Trades Council and Pittsburgh Building Trades Council,
Appellants in No. 81-1697

Long John Silver's, Inc.,
Appellant in No. 81-1698

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
C.A. No. 75-0979

Argued Monday, October 26, 1981
Before: ADAMS, VAN DUSEN, and SLOVITER,
Circuit Judges
(Filed January 25, 1982)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*

This is the second time this case has come before us. In *Larry V. Muko, Inc., v. Southwestern Pennsylvania Building and Construction Trades Council*, 609 F.2d 1368 (3d Cir. 1979) [*Muko* I], this Court, sitting *in banc*, reversed a district court order granting defendant's motion for a directed verdict and remanded the case for a new trial. The second trial resulted in a jury verdict for the defendants, and the plaintiff once again has appealed to this Court. We affirm.

I.

Long John Silver's, Inc. ("Silver's"), a Delaware corporation headquartered in Lexington, Kentucky, operates fast food seafood restaurants in several markets across the United States. In 1973, it decided to enter the Pittsburgh, Pennsylvania market, and contracted with Larry V. Muko, Inc. ("Muko"), a non-union general contractor experienced in constructing fast food restau-

rants, to build its first outlet in Monroeville, a suburb of Pittsburgh. After completion of the Monroeville restaurant, Silver's president Jim Patterson met with Larry Muko and indicated his willingness to give future construction business to Muko if his prices remained competitive and the quality of his construction remained good. Muko was awarded a contract to build a second restaurant in Lower Burrell, Pennsylvania, but Silver's did not commit itself any further.

During construction of the Monroeville restaurant, two labor organizations, the Southwestern Pennsylvania Building and Construction Trades Council and the Building and Construction Trades Council of Pittsburgh (the "Councils"), picketed the site. After completion of construction, handbills were distributed to customers of the Monroeville restaurant urging them not to patronize Silver's because the chain used "contractors who are paying less than the established prevailing wages in the area." Appendix 115a. The handbill exhorted the customers "to protect the living and working standards established by the Building Trades Council." *Id.*

Silver's management was alarmed when it was informed that customers were leaving the premises after reading the handbill. In response to the leafletting, Silver's arranged a meeting with the Building Trades Councils. After the meeting, Silver's vice-president sent a letter to the Councils emphasizing the company's "desire to establish good working relationships with the unions in the Greater Pittsburgh Area" and stating Silver's "intent . . . to use only union contractors certified by the [Councils]" in the future. The letter concluded: "In any relationship between two parties there must be mutual need and assistance. . . . It is . . . extremely important to both parties that our location at Monroeville, Pennsylvania and the one under construction in Lower Burrell Township, Pennsylvania not be subjected to any kind of informational picketing." Appendix at 116a-117a.

Subsequently, Silver's employed only unionized general contractors to build its Pittsburgh-area restaurants, although the general contractors were free to use non-union subcontractors. Silver's discussed with Muko the question whether Muko would be willing to bid on the construction of its restaurants as a union firm. Muko declined to build under such circumstances, however, and it was not awarded any of Silver's contracts after the construction of the Lower Burrell restaurant.

On August 12, 1975, Muko filed the present lawsuit against Silver's and the two Councils, alleging that the defendants had entered into an agreement to award contracts for the construction of Silver's restaurants in the Pittsburgh area only to union contractors. This, claimed Muko, was an unreasonable restraint of trade in violation of section 1 of the Sherman Act and sections 4 and 16 of the Clayton Act. After Muko presented its case at a jury trial held on July 19-20, 1977, the district court granted the defendants' motion for a directed verdict. The directed verdict apparently was granted "because the court believed the evidence could sustain no finding other than a unilateral decision on the part of Silver's to accept bids only from union contractors." 609 F.2d at 1372. On appeal, this Court, sitting *in banc*, reversed and remanded the case for a new trial. 609 F.2d 1368. We held that the jury could have found an agreement between Silver's and the Councils that was not exempt from antitrust scrutiny because, under the standards set forth in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), such an agreement might have "actual or potential anti-competitive effects that would not flow naturally from the elimination of competition over wages and working conditions." 609 F.2d at 1373.

Upon remand, a bifurcated jury trial on issues of liability and damages took place. At the close of the evidence on liability, the district court submitted four special interrogatories to the jury:

1. Did Long John Silver's and the Trade Councils enter into an agreement or combination to refuse to grant construction contracts to non-union builders, including Muko?

Answer: YES____ NO____

If your answer to question 1. is NO, go no further. If your answer to question 1. is YES, go on to question 2.

2. Was the effect of the agreement between Long John Silver's and the Trade Councils to impose a restraint on free competition beyond that which would follow from the elimination of competition based on wage rates and working conditions?

Answer: YES____ NO____

If your answer to question 2. is NO, go no further. If your answer to question 2. is YES, go on to question 3.

3. Was the agreement between Long John Silver's and the Trade Councils an unreasonable restraint of trade under the standards given you by the court in its instructions?

Answer: YES____ NO____

If your answer to question 3. is NO, go no further. If your answer to question 3. is YES, go on to question 4.

4. Did the agreement between Long John Silver's and the Trade Councils cause injury to the plaintiff in his business or property?

Answer: YES____ NO____

On February 17, 1981, the jury returned its verdict, answering "Yes" to Interrogatories 1 and 2 and "No" to Interrogatory 3. The jury thus found that the defendants had reached an agreement, outside the labor exemption, to exclude Muko as a competitor for Silver's construction

work. Because the jury concluded that the agreement was not an unreasonable restraint of trade, however, the district court entered judgment for the defendants. The district court subsequently denied Muko's motion for a new trial and denied defendants' conditional motions for judgment n.o.v. This appeal followed.

II.

Muko challenges two aspects of the district court proceeding. First, it claims that the trial judge erred as a matter of law when he instructed the jury to apply the rule of reason, rather than the *per se* standard, to the agreement at issue. Second, it argues that, even if the district judge was correct in applying the rule of reason, he erred in his instructions on the relevant product market. We disagree with both contentions.[1]

III.

A.

In the earlier *in banc* opinion in this case, we declined to decide the proper standard by which to measure any potential antitrust violation. We intimated, however, that traditional antitrust principles would govern such a determination by the district court:

> The jury might have found a concerted refusal to deal with a class of contractors of which Muko is a member. But whether the evidence here is viewed

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1. Silver's argues that these two points cannot be assigned as error under Fed. R. Civ. P. 51 because Muko failed to present timely objections to the district court. While Muko may not have formally objected to the jury charge, it is clear from the record that the judge was made aware of Muko's position "before the jury retire[d] to consider its verdict." *See, e.g.*, Appendix 63a-66a; 98a-102a; 1138a; 1220a-1221a. We therefore conclude that Muko did not waive its right to appeal under Rule 51. *See United States v. General Motors Corp.*, 226 F.2d 745, 750 (3d Cir. 1955).

> as capable of sustaining a finding of a group boycott, to which a *per se* rule would apply, or some lesser restraint to which a rule of reason analysis might apply, it was sufficient to take Muko's case to the jury. We have no occasion on this record to rule on whether, after hearing the defendants' evidence as well, the court should instruct the jury that it should measure the agreement by rule of reason or *per se* standards.

609 F.2d at 1376 (footnote omitted).

In counseling that the level of antitrust inquiry depends upon the nature of the conduct alleged, even in the labor-antitrust context, *Muko* I reflected the approach taken by a panel of this Court in *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980) ["*Conex*"], a case decided several months prior to *Muko* I. There, the plaintiff was a freight consolidator whose business was threatened after defendants New York Shipping Association (an association of employers) and the longshoremen's union negotiated "Rules on Containers" and the so-called "Dublin Supplement" in response to the perceived threat to waterfront labor posed by technological change in the shipping industry. Conex claimed, *inter alia*, that the defendants' enforcement of the rules constituted a group boycott of the plaintiffs that was illegal *per se* under the Sherman Act.[2] We held, as an initial matter,

2. The National Labor Relations Board had previously held the rules to be a violation of §8(e) of the NLRA, 29 U.S.C. §158(e). That section declares that it "shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. . . ." In *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980), however, a related case on certiorari from the District of Columbia Circuit, the Supreme Court held that, in determining that

"that the proper method of analysis is to determine the issue of nonstatutory labor exemption separately, . . . and then to proceed with conventional antitrust scrutiny of the complaint." 602 F.2d at 522. In so holding, the *Conex* Court expressly rejected Professor Handler's view "that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust." Handler, *Labor and Antitrust: A Bit of History*, 40 Antitrust L.J. 233, 239-40 (1971). Pointing to *United Mineworkers v. Pennington*, 381 U.S. 657 (1965), and its companion case, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), Judge Gibbons concluded: "[T]he three groups of Justices in those cases, while they diverged widely on other issues, appear to have agreed that 'settled antitrust principles' would be 'appropriate and applicable' to activity found to be nonexempt. . . . Those 'settled' principles include the *per se* rule, *where the facts warrant its application.*" 602 F.2d at 522-23 (emphasis added).

We take this opportunity explicitly to reaffirm the holding in *Conex*, as reflected implicitly in *Muko* I. In so doing we adopt a middle position between that advocated by Professor Handler and that proposed by the appellant in the case at hand. While we agree with Professor Handler that the "factors to be considered in determin-

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NOTE — (*Continued*)
the agreement implementing the Rules on Containers violated §8(e), the Board had applied an incorrect legal standard. The Court therefore remanded that case to the Board for further proceedings, and subsequently vacated and remanded our decision in *Conex* for further consideration in light of *International Longshoremen's Ass'n*, 448 U.S. at 902. On remand, we ordered *Conex* stayed pending disposition of the §8(e) charge by the Board. 641 F.2d 90 (3d Cir. 1981). We noted, however, that those aspects of our earlier decision not predicated on a finding that §8(e) had been violated — including, presumably, our discussion of the proper standard of antitrust scrutiny — were not affected by the vacation and stay. 641 F.2d at 94.

ing the existence of an antitrust *exemption* are separate and distinct from those bearing on the presence of an antitrust *infraction*," and that "once such conduct is deemed not exempt, it is incumbent upon the decisionmaker to consider the relative anticompetitiveness of the conduct before imposing antitrust liability," Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 Colum. L. Rev. 459, 511 (1981), we do not share Professor Handler's view that union conduct necessarily "should be measured by the rule of reason in recognition of the peculiar labor relations context in which the restraint arises even if, in a nonlabor context, similar conduct might be per se unlawful." *Id.* at 510.[3] The mere fact that a labor union is one of the participants in an otherwise illegal combination should not preclude a determination that, in appropriate circumstances, the conduct is unreasonable *per se*. *See, e.g., Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945). The *per se* rule is, essentially, a short cut employed by a court in determining unreasonableness; as Professor Sullivan has taught, "the *per se* doctrine is precisely a special case of rule of reason analysis." L. Sullivan, Handbook of the Law of Antitrust (1977). *See* discussion in part III(B) *infra*. If, after extensive experience with a particular kind of union conduct, a court concludes that the conduct invariably restrains competition, it is unnecessary.

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3. Several commentators appear to share Professor Handler's view. *See, e.g.*, Casey & Cozzillio, *Labor-Antitrust: The Problems of Connell and a Remedy that Follows Naturally*, 1980 Duke L.J. 235, 278; Comment, Consolidated Express: *Antitrust Liability for Illegal Labor Activities*, 80 Colum. L. Rev. 645, 660-63 (1980). *Cf.* Leslie, *Principles of Labor Antitrust*, 66 Va. L. Rev. 1183, 1222-24 (1980) (rejecting both the *per se* and the rule of reason standards and urging that union-imposed restrictions should be deemed unlawful "only if they involve price-fixing, output-restricting, or market-sharing arrangements").

in our view, for the court to engage in lengthy rule-of-reason analysis when the *per se* rule would yield identical results more efficiently and expeditiously.

It is important, however, to caution against mechanical or imprudent application of the *per se* rule in the labor context. A finding that particular union conduct has anticompetitive effects that do "not flow naturally from the elimination of competition over wages and working conditions," and hence is non-exempt under *Connell*, should not drive a court inexorably to the conclusion that the union has violated the antitrust laws. We thus cannot agree with Muko, who contends that every labor-antitrust case in which the labor exemption is found to be inapplicable should be held illegal under the *per se* standard.

In support of this proposition Muko points to the following language in the *Conex* opinion:

> [O]nce a court has concluded that the labor exemption does not shield anticompetitive conduct, application of the rule of reason is redundant. The justification offered for application of the rule of reason is the need to recognize, in the antitrust context, labor's legitimate interest in the collective bargaining process. That interest, however, is precisely the same one that must be taken into account in determining the scope of the nonstatutory labor exemption. A holding that the exemption does not apply embodies a judgment that considerations of labor policy are outweighed by the anticompetitive dangers posed by the challenged restraint. The proposed use of the rule of reason would, therefore, simply be an invitation to the court or jury to reweigh under a different label the question of the non-statutory exemption.

602 F.2d at 523-24.

Although this language appears to support Muko's contention, the actual holding in *Conex* is far narrower

in scope. In *Conex*, in fact, this Court carefully analyzed the conduct in question before determining that it constituted a *per se* illegal group boycott. *See* discussion in part III(B) *infra*. Indeed, the Court suggested that had procompetitive effects been shown, the boycott may have been removed from the category of *per se* violations. *See* 602 F.2d at 524 n.18 and accompanying text. As the *Conex* majority points out, "public interest" considerations, such as the advancement of labor policy, are not proper subjects for examination under the rule of reason. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).[4] The passage from *Conex* quoted above merely reflects the view that it is unnecessary, if not improper, to weigh "labor's legitimate interest in the collective bargaining process" twice — once in determining the labor exemption and again in deciding the antitrust liability question. *See* Casey & Cozzillio, *supra* note 3, at 271. There is no indication that the Court was prepared to find that the defendants' conduct was *per se* illegal merely because it was not exempt from the antitrust laws.[5] Moreover, in *Muko* I, Judge Gibbons — who earlier had written *Conex* — explicitly left open the possibility that a "lesser restraint,"

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4. Rather than attempting to distinguish *Professional Engineers*, Professor Handler suggests that more recent Supreme Court decisions "point[] toward a rejection of the *Professional Engineers* test." 81 Colum. L. Rev. at 512 n.299 (citing *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23-26 (1979)).

5. We are thus unpersuaded by Muko's recitation of the legislative history of §8(e) of the NLRA, (the so-called "hot cargo" provision) which indicates Congress' intent to make hot cargo agreements illegal *per se* under the labor laws. Brief for Appellant at 16-18. *See* note 2 *supra*. Even assuming that the defendants' conduct would be deemed illegal under §8(e), we see no reason to presume that Congress intended the same conduct to be ipso facto violative of the antitrust laws, which were enacted at a different time, for a different purpose, and which provide for sharply different relief. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 634 (1975).

though nonexempt, might be judged under the rule of reason. 609 F.2d at 1376. *But see* King & Moser, Muko *and* Conex: *The Third Circuit Responds to* Connell, 8 Pepperdine L. Rev. 79 (1980).

In short, a fair reading of both *Conex* and *Muko* I impels the conclusion that, once it is ascertained that union activity falls outside the protection of the labor exemption, a court must apply traditional antitrust principles in determining whether the activity in question violates the antitrust laws.[6] In most cases the rule of reason will supply the measure of illegality; the *per se* rule may, however, be invoked where appropriate. We turn now to this inquiry.

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6. A number of other courts appear to have adopted a similar approach. *See, e.g., Ackerman-Chillingworth v. Pacific Electrical Contractor Assoc.*, 579 F.2d 484, 490 n.7 (9th Cir. 1978) (applying the rule of reason to the facts at issue, but noting: "in the absence of any of the competitive injuries wrought by the classic-type boycotts traditionally considered as unlawful *per se*, the district court properly rejected application of the *per se* rule"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177-82 (D.C. Cir. 1978) (applying the "traditional framework of analysis under §1 of the Sherman Act," court concludes that the defendants' conduct should be tested under the rule of reason because it cannot be considered a classic group boycott, which would require invocation of the *per se* rule); *Mackey v. National Football League*, 543 F.2d 606, 618-19 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (same). *But see Berman Enterprises Inc. v. Local 333, International Longshoremen's Assoc.*, 644 F.2d 930, 936 (2d Cir. 1981) (concluding without discussion that the rule of reason "would be applicable"); *South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767, 775 (6th Cir. 1970) (holding that "when a labor union and an employer enter into a plan or scheme of the type which results in the union closing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint under the antitrust laws"). *Cf. Commerce Tankers Corp. v. National Maritime Union of America*, 553 F.2d 793, 802 (2d Cir. 1977) (court remands for consideration of antitrust claim without deciding which standard applies, but notes that there is "at least a substantial question whether a per se approach under the antitrust laws is applicable in the case of a non-exempt labor activity").

B.

Though framed in absolute terms, section 1 of the Sherman Act[7] has been construed throughout its history to proscribe only *unreasonable* restraints of trade. *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). In most cases, a "rule of reason" analysis requires a detailed examination of the affected business and the nature of the restraint imposed.[8] There are, however, "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Such determinations of *per se* illegality are not casually made. As the Supreme Court noted in *United States v. Topco Associates*, 405 U.S. 596, 607-08 (1972), and as our Court reiterated most recently in *Tose v. First Pennsylvania Bank*, 648 F.2d 879, 891 (3d Cir.), *cert denied*, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981), "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *See Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166-67 (3d Cir. 1979); *Harold Friedman Inc. v. Thorofare Markets Inc.*, 587 F.2d 127,

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7. 15 U.S.C. §1 (1976) (prohibiting "[e]very contract, combination . . . or conspiracy in restraint of trade.").

8. *See National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.) ("[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.").

140 (3d Cir. 1978).[9] Neither mere speculation, nor the desire to simplify the cumbersome process of determining antitrust illegality, is enough to justify the imposition of a *per se* rule. In *Tose*, for example, we declined to extend the *per se* rule to an agreement to force a distress sale of a partner's share of a business because we were "not aware of any body of judicial experience teaching" that such an agreement had a " 'pernicious effect on competition . . . .' " 648 F.2d at 891. In short, "departure from the rule-of-reason standard must be based upon *demonstrable economic effect* rather than . . . upon formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (emphasis added).

Group boycotts have typically been among those categories of conduct deemed unreasonable *per se*. *See, e.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941). In *Klor's, supra*, for example, the Supreme Court condemned as

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9. *See also White Motor Co. v. United States*, 372 U.S. 253 (1963), in which the Supreme Court, facing for the first time the question of the legality of a vertical territorial restraint, stated:

> Horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition. A vertical territorial limitation may or may not have that purpose or effect. *We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain.* They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business . . . and within the "rule of reason." *We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as* per se *violations of the Sherman Act.*

372 U.S at 263 (emphasis added) (citations omitted).

unlawful an agreement between a large chain department store and a group of manufacturers and distributors not to deal with a smaller, competing retail store. The Court declared:

> Group boycotts, or *concerted refusals by traders to deal with other traders*, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Cf. *United States v. Patten*, 226 U.S. 525, 542.

359 U.S. at 212 (footnote omitted) (emphasis added).

Though *Klor's* appears flatly to proscribe group boycotts, whatever their form or function, courts and commentators[10] alike continue to resist the notion that all

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10. *See, e.g.*, Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Colum. L. Rev. 685, 705 (1979) (advocating invocation of the *per se* rule only when the conduct is "intended to coerce or exclude other entrepreneurs" and is "likely to have anticompetitive effects"); McCormick, *Group Boycotts — Per Se or Not Per Se, That is The Question*, 7 Seton Hall L. Rev. 703 (1976); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 Rutgers L. Rev. 773 (1974); Comment, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131, 1150-52 (1980); Comment, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule*, 71 Nw. U.L. Rev. 818 (1977).

concerted refusals to deal fall automatically as *per se* violations of the antitrust laws. Generally, the application of the *per se* rule has been limited to those "classic" boycotts in which a group of business competitors seek to benefit economically by excluding other competitors from the marketplace.[11] "The crucial element" in such boycotts, according to Professor Sullivan, "is an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete. The classic boycott . . . also usually entails an effort to induce two or more suppliers or customers not to deal with firms being excluded from the protected level." L. Sullivan, *Handbook of the Law of Antitrust* 260 (1977).

While the Supreme Court has not confronted this issue directly, a survey of the Court's group boycott decisions in which the *per se* rule was invoked "confirms that it is attempts by competitors to exclude horizontal competitors which trigger the per se rule." Comment,

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11. In *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), for example, the District of Columbia Circuit defined the "classic group boycott" as

> a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically, the boycotting group combines to deprive would-be competitors of a trade relation ship which they need in order to enter (or survive in) the level wherein the group operates.

593 F.2d at 1178 (footnote omitted). The Court held that the National Football League player draft was "not the type of group boycott that traditionally has elicited invocation of a *per se* rule." *Id.* at 1179. Two factors distinguished the player draft from the classic group boycott: First, the NFL clubs that had combined were not competitors in any economic sense; no team was "interested in driving another team out of business." *Id.* Second, the NFL clubs had not combined "*to exclude competitors or potential competitors* from their level of the market." *Id.* (emphasis in original). *See also Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

Protest Boycotts Under the Sherman Act, 128 U. Pa. L. Rev. 1131, 1151 (1980). In *Klor's*, for example, the unlawful conduct was the attempt by one retailer to push a competitor out of the market. Similarly, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), the plaintiff, a gas burner manufacturer, complained that the arbitrary denial of a gas association's "seal of approval" prevented the company from competing with the manufacturer-members of the association. The Supreme Court held that the plaintiff was entitled to a trial on these allegations. In *United States v. General Motors Corp.*, 384 U.S. 127 (1966), a scheme in which retailers induced a manufacturer not to sell to competing discount retailers was held illegal *per se* under the Sherman Act. And in *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941), the Court concluded that the *per se* rule was appropriate where one group of manufacturers attempted to induce retailers not to buy from another group of manufacturers. Significantly, while the Supreme Court recently declined to limit, for purposes of the McCarran-Ferguson Act, the definition of the term "boycott" to "those combinations which target *competitors* of the boycotters as the ultimate objects of a concerted refusal to deal," the Court did intimate that it was willing to distinguish between those boycotts that were unreasonable *per se* and those that were not. *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 542 (1978). Noting the continuing controversy over the definition of the *per se* illegal boycott, the Court declared: "But the issue before us is whether the conduct in question involves a boycott, not whether it is *per se* unreasonable." *Id. See* Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Colum. L. Rev. 685, 691-92 (1979).

Our circuit is among those that have attempted to limit the application of the *per se* rule to the "classic" boycott. As we stated in *DeFilippo v. Ford Motor Co.*, 516

F.2d 1313, 1317 (3d Cir.) *cert. denied*, 423 U.S. 912 (1975):

> The inquiry in any case seeking to apply this rule of *per se* unreasonableness must be whether or not the activities of defendants properly fall within the "group boycott" categorization. . . . "The term 'group boycott' . . . is in reality a very broad label for divergent types of concerted activity. To outlaw certain types of business conduct merely by attaching the 'group boycott' and 'per se' labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed."

Id. at 1317-18 (quoting *Worthen Bank & Trust Co. v. National Bank Americard, Inc.*, 485 F.2d 119, 125 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974)).

In *DeFilippo*, we concluded, after surveying relevant Supreme Court precedent, that a concerted activity constitutes a *per se* illegal "group boycott" only when " 'there [is] a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both.' " 516 F.2d at 1318 (quoting *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970)). There, the defendant, Ford Motor Company, had refused to consummate a "special terms" arrangement between it and one of its dealers, after other area dealers protested. Because this refusal did not deprive plaintiffs of the opportunity to become a Ford dealer, or to purchase products on the same basis as other dealers, we held that the concerted action at issue in the case "did not constitute a group boycott *in the sense of* a *per se* unreasonable restraint of trade." *Id.* at 1320 (emphasis added).

More recently, in *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978), we again faced the problem of defining the term "group boycott" and determining the bounds of

its legality. In *Sitkin*, the plaintiff complained that the defendant had engaged in a sham bidding scheme with a third party, whereby the defendant agreed that the third party would be awarded a contract to dismantle defendant's rayon plant if it matched the bid of the otherwise highest bidder. The Court declined to hold that this conduct constituted an illegal group boycott: "The controlling cases involve broad combinations and rather pervasive refusals to deal by a group of suppliers covering many transactions over an extended period of time. . . . We are not confronted with such a factual situation here. Plaintiffs have not brought to our attention any case where a court has found a per se violation of the Sherman Act on the basis of a concerted refusal to deal between a single seller and a single buyer." 575 F.2d at 446-47 (citations omitted).

In contrast, the Court indicated its willingness to apply the *per se* rule in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). There, the manufacturer of kitchen cabinets allegedly terminated its sales to a discount retailer at the urging of another competing retailer, who wished to maintain prices. Like *Klor's* and *General Motors*, the case involved the attempt of one competitor to squeeze out its direct competitor. "[A]lthough the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level." 595 F.2d at 168. Thus, we reversed the summary judgment entered in favor of the defendants on the ground that at trial a *per se* violation of the Sherman Act might be found. *See* Comment, *Vertical Agreement as Horizontal Restraint:* Cernuto, Inc. v. United Cabinet Corp., 128 U. Pa. L. Rev. 622 (1980).

Finally, in *Conex*, discussed *supra*, we addressed the question whether a group boycott in the labor context was *per se* unreasonable. There, we outlined a "core group of situations" in which group boycotts have been deemed illegal *per se:*

> (1) horizontal combinations of traders at one level of distribution having the purpose of excluding direct competitors from the market, *e.g., Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914); (2) vertical combinations, designed to exclude from the market direct competitors of some members of the combination, *e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); and (3) coercive combinations aimed at influencing the trade practices of boycott victims. *E.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

602 F.2d at 522. *See E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

In *Conex*, after holding that the Rules on Containers and the Dublin Supplement were not exempt from the antitrust laws, the Court concluded that the facts of the case did warrant the application of the *per se* rule. Specifically, we found that the rules had "horizontal, vertical, and coercive aspects": the goal of the union organization was "work acquisition" because the "union's efforts clearly were directed toward the elimination of teamster competition"; the rules "wholly bar" the plaintiffs from providing their services in the market in question; the "anticompetitive effect of [the] arrangement [was] clear"; nor was there "any suggestion in the record that the application of the Rules will in the long run have procompetitive rather than anticompetitive effects." In sum, the Court determined that the rules represented

" 'agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.' " *Conex* at 522-23, (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978)).

C.

Applying the foregoing principles to the case at hand, we conclude that the agreement between Silver's and the Trade Councils should not be deemed unreasonable *per se*. A distillation of the facts at issue here makes it clear that this is not a classic group boycott; the defendants' conduct should not be proscribed until the factfinder has been given the opportunity to determine its reasonableness. Simply put, a small retailer has been picketed by a union. To preserve its business, the firm agrees to purchase union-made goods or services in the future. We cannot agree with Muko or the dissent that this is the kind of behavior against which the *per se* rule traditionally has been invoked. Unlike *Klor's* and *General Motors*, this is not a case in which one competitor, through concerted action with a supplier or customer, attempts to cut another, horizontal competitor out of the marketplace. Nor is there any suggestion of attempted price-fixing, as in *Cernuto*. Notwithstanding the dissent's assertion, which is not grounded on record evidence, that Muko "must be viewed as the representative of non-union labor," the fact remains that neither Silver's nor the Trades Councils was in competition with each other or with Muko. There is no evidence that Silver's goal was to affect Muko's business; rather, it is uncontradicted that Silver's sought only to retain the goodwill of its customers in a new market. The Councils' goal was to ensure payment of the prevailing union wage to Pittsburgh-area construction workers. The record is barren of anything to suggest that either of the defendants wished, through their concerted action, to gain an

advantage over Muko in an *economic* or *competitive* sense. This fundamentally distinguishes the present case from *Conex*, which involved an agreement between the defendant longshoremen's union, common carriers, and stevedores to exclude from direct competition all the teamsters employed by the plaintiff freight consolidators.

We note, too, the limited nature of the restraint at issue here. Unlike *Conex*, in which the defendant union imposed a widespread restraint of trade, affecting the entire shipping industry, the "refusal to deal" in this case involved only one relatively small buyer: Silver's. Moreover, we fail to perceive the significant anti-competitive effects alleged by the appellant. Again, unlike *Conex*, the agreement did not have the necessary effect of destroying Muko's business; indeed, the evidence shows that Muko's profits increased during the time in question. Appendix at 127a. Silver's also appeared prepared to give Muko the job of constructing future restaurants if Muko employed union labor. Finally, procompetitive effects were demonstrated — Silver's gained a position in the otherwise crowded Pittsburgh-area fast food market.

The dissent points to a series of cases in an effort to support its view that Silver's agreement not to employ non-union contractors is unreasonable *per se*. None is apposite. Most of the cases cited — *Klor's, Fashion Originators', Radiant Burners,* and *Cernuto,* discussed *supra* — involve horizontal restraints (or, perhaps more accurately, vertical restraints with horizontal effects) by direct competitors. Similarly, *United States v. Topco Associates*, 405 U.S. 596 (1972), involved a horizontal territorial restraint. Another case, *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), a suit brought by the Government to nullify a professional association's canon of ethics prohibiting competitive bidding, was decided under the rule of rea-

son. Indeed, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), overruled the *per se* rule of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) that had previously governed vertical restraints. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), cited by the dissent for the proposition that a procompetitive effect in one market will not excuse an anticompetitive effect in another, was a merger case under section 7 of the Clayton Act, 15 U.S.C. §18. The defendants sought to defend their merger in part on the proposition that "if all the commercial banks in the Philadelphia area merged into one, it would be smaller than the largest bank in New York City." 374 U.S. at 370. While the Court rejected this argument as a justification for a merger, it in no way addressed the question whether procompetitive effects could be considered in making the initial determination whether conduct was so pernicious as to be illegal *per se* under section 1 of the Sherman Act. And, finally, in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 542 (1978), discussed *supra*, the Supreme Court explicitly declined to address the question whether all boycotts were unreasonable *per se*.

In sum, we have been referred to no case that suggests that the agreement at issue here is one "whose nature and necessary effect [is] so plainly anticompetitive that no elaborate study of the industry is needed. . . ." *Conex* at 522-23. Accordingly, we hold that the district court did not err in instructing the jury to apply the rule of reason, rather than the *per se* standard, to the conduct in question in this case.

IV.

We turn now to Muko's second contention in this appeal — that the district court erred in instructing the jury on the relevant product market.

At trial, Muko's expert testified that the relevant

product market was the construction of fast food restaurants. Defendants contended that the relevant product market was the construction of small commercial buildings, including fast food restaurants. The trial judge instructed the jury that it could consider whether the construction of fast food restaurants was

> a type of trade in which the contractors limit themselves or specialize in to the exclusion of other lines; is the construction of fast food restaurants, from what you have heard in the evidence here, a line of trade, a real line of trade in which somebody either devotes all his time, he doesn't do anything else, or a majority of his time or is that bigger? Do contractors in general — not necessarily the plaintiff here, all of them, do they regard this as an activity in which they devoted their time and energy and assets to so that, if that is blocked, they can't easily change to another line? . . .
>
> If this agreement puts a restraint only on fast food restaurants, is that sufficiently reasonable for your consideration, or can contractors who do fast food restaurants just as easily do convenience stores, 7-Eleven Stores, small business buildings, branch banks? Is the line of trade confined to restaurants, or is it a little bigger, to include, as has been argued here, small commercial buildings?

Appendix at 1253a-1254a.

Muko objects to the trial court's instruction in this respect because the charge "made definition of the market and reasonableness of the restraint dependent upon Muko's ability to compete in a market other than the one in which the alleged restraint occurred." Brief for Appellant at 21. It points to cases such as *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) and *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956), arguing that the fact that "the defendant in *DuPont* was

presumably able to make wrapping products other than cellophane" was not relevant to a determination of the product market: "The law does not, however, define either the product market or the reasonableness of a restraint in terms of the versatility of the alleged antitrust victim." Brief for Appellant at 33.

In a traditional section 2 monopolization case, the "product market" is defined in terms of cross-elasticity of demand — can the consumer of the product of an alleged monopolist switch easily to a substitute product, thereby undercutting the monopolist's power? *See Brown Shoe, supra.* As this Court held in *SmithKline Corp. v. Eli Lilly and Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978):

> defining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability — actual or potential — to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

575 F.2d at 1063. *See also Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1349 (3d Cir. 1975) (emphasizing "interchangeability" of products).

It should be remembered that this case is *not* a monopolization case; nor is it a restraint of trade by *producers* of the product. Here, the *consumers* of Muko's product (construction services) have contracted to restrain trade. Thus the market must be analyzed not in terms of cross-elasticity of *demand* for the product, but of cross-elasticity of *supply*. That is, can Muko easily substitute one product (any type of small commercial building) for another (fast food restaurants)?

Under this analysis, Muko's argument fails to withstand scrutiny. The district court did not instruct the jury to decide whether, if pushed out of the "relevant

product market," Muko could enter a new, unrelated market. It simply asked the jury to determine whether Muko's "line of trade" was confined to fast food restaurants or whether it included other sorts of small commercial buildings. We find no error in this instruction.

V.

To summarize, we hold that the district court correctly instructed the jury on the rule of reason standard as well as on the relevant product market. Accordingly, the order of the district court, entering judgment for the defendants, will be affirmed.[12]

SLOVITER, *Circuit Judge*, dissenting.

My difference with the majority is narrow but fundamental. I agree with the majority that the precedent of *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), *Consolidated Express, Inc. v. New York Shipping Association, Inc.*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980), and *Muko I* compels the conclusion that "once it is ascertained that union activity falls outside the protection of the labor exemption, a court must apply traditional antitrust principles in determining whether the activity in question violates the antitrust laws." Typescript op. at 11. I disagree with the majority that the application of traditional antitrust principles to the agreement found by the jury in this case supports the trial court's instruction to the jury that the

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12. Because of our disposition of this case, it is unnecessary for us to address the questions raised in defendants' conditional cross-appeals.

rule of reason rather than the *per se* standard must be applied.

Although the parties disagree on the inferences to be drawn from the evidence, the jury could have found that at the meeting on November 1, 1973, representatives of Silver's and the Trades Councils reached an agreement, the substance of which was reflected in the letter sent by Silver's Vice-President within a week thereafter, that Silver's would use only union contractors certified by the Trades Councils in the construction of the Silver's restaurants. Interrogatory 1 to the jury asked "Did Long John Silver's and the Trades Councils enter into *an agreement or combination to refuse to grant construction contracts to non-union builders, including Muko?*" (emphasis added). It replied in the affirmative. Thereafter, by its reply to Interrogatory 2, the jury found that the effect of the agreement between Silver's and the Trades Councils was to impose a restraint on free competition "beyond that which would follow from the elimination of competition based on wage rates and working conditions." In other words, the defendants entered into an agreement, and that agreement fell outside the nonstatutory labor exemption.

The majority gives four reasons for its unwillingness to apply the *per se* standard usually applicable to concerted refusals to deal: (1) "neither Silver's nor the Trades Councils was in competition with each other or with Muko," and no evidence suggests that either defendant wished, through their concerted action, to gain an advantage over Muko in an economic or competitive sense; (2) "the 'refusal to deal' in this case involved only one relatively small buyer: Silver's", rather than the imposition of a "widespread restraint of trade"; (3) "the agreement did not have the necessary effect of destroying Muko's business," since his profits increased during the time in question and Silver's might have permitted Muko to construct future restaurants if Muko employed union labor; and (4) "procompetitive effects were dem-

onstrated" because Silver's gained a position in the otherwise crowded Pittsburgh-area fast food market. Typescript op. at 20-21. I believe the grounds on which the majority bases its decision are either factually erroneous or legally irrelevant. Those grounds will be considered seriatim.

(1) The principal reason relied upon by the majority, both in its legal analysis and in its application of the legal principles to the case at hand, is its view that "this is not a case in which one competitor, through concerted action with a supplier or customer, attempts to cut another, horizontal competitor out of the marketplace." In the same paragraph, the majority enunciates its conclusion that there was no anticompetitive intent underlying the agreement. Thus, the majority states, Silver's "goal" was not to affect Muko's business but "to retain the goodwill of its customers in a new market"; the Councils' "goal was to ensure payment of the prevailing union wage". Neither defendant was, according to the majority, "in competition . . . with Muko" and neither sought "to gain an advantage over Muko in an *economic* or *competitive* sense." Typescript op. at 20 (emphasis in original).

The legal and factual flaws underlying the majority's analysis are numerous. It is of no small significance that in dealing with the definition of a "boycott", as that term is used in the McCarran-Ferguson Act, 15 U.S.C. §1011 *et seq.* (1976), the Supreme Court rejected the contention that "boycott" embraces "only those combinations which target *competitors* of the boycotters as the ultimate objects of a concerted refusal to deal." *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 542 (1978) (emphasis in original). The Court noted instead:

> As the labor-boycott cases illustrate, the boycotters and the ultimate target need not be in a competitive relationship with each other. This Court

> also has held unlawful, concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers. See, *e.g.*, *Paramount Famous Corp. v. United States*, 282 U.S. 30 (1930); *United States v. First Nat. Pictures, Inc.*, 282 U.S. 44 (1930); *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923). See also *Anderson v. Shipowners Assn.*, 272 U.S. 359 (1926). As the Court put it in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951), "the Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers."

Id. at 543-44 (footnote omitted). Although the majority states that in the *St. Paul* case, "the Court did intimate that it was willing to distinguish between those boycotts that were unreasonable *per se* and those that were not", typescript op. at 16, I would not be comfortable with that reading of the case in light of the Supreme Court's express disclaimer of any such intimation. After referring to the attempt by commentators to define those boycotts to which the *per se* approach should be limited, the Court stated, "We express no opinion, however, as to the merit of any of these definitions." *Id.* at 542 n.14. Its express rejection of a limitation of the boycott definition to those agreements that target competitors undercuts the legal foundation upon which the majority opinion is constructed.

Even if use of a *per se* analysis is justified, as the majority suggests, only when there is some competitive impact, the majority's failure to recognize such an impact stems from a somewhat naive perception of the marketplace in which this agreement was wrought. The Trades Councils are representatives of union labor; Muko, a non-union contractor, must be viewed as the

representative of non-union labor. Thus the parties represent two strong *competitive* forces in the Pittsburgh area construction industry. If the Trades Councils succeed in their effort to limit the construction work available to firms using non-union labor, the union workers will have gained a competitive advantage over the non-union workers. This is an economic conflict in the most basic sense.

Because the true antagonists are workers, not businesses, "strong labor policy favor[s] the association of employees to eliminate competition over wages and working conditions." *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. at 622. Notwithstanding the actual or potential anticompetitive effects that flow from such agreements, the non-statutory labor exemption from the antitrust laws which is applied even to union-employer agreements is founded on the recognition that "labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions." *Id.* But once the agreement has effects which extend beyond the lessening of business competition based on differences in wages and working conditions, we are compelled to apply traditional antitrust analysis.

Significantly, the unions in this case did not use the customary method by which organized labor attempts to effectuate its goals regarding wage rates and working conditions, which would have been to seek to organize Muko's employees. Instead, for reasons which do not appear on the record, the unions circumvented that route and confined themselves to pressuring Silver's not to do business with Muko merely because Muko employed their competitors, the non-union workers. It is because this effort had an effect, as the jury found, beyond that on wages and working conditions, that the Trades Council — Silver's agreement goes beyond the recognized labor protection. As such, it is indistinguishable from simi-

lar agreements which have been placed in the *per se* category.

As we pointed out in *Consolidated Express*, defendants cannot avoid *per se* illegality merely because they had no anticompetitive intent. We stated there, in rejecting the relevance of the factor of "goal" on which the majority here relies, "A showing of a specific intent to harm one's competitors or restrain competition need not be shown." 602 F.2d at 523. In effect, the majority's use of the "goal" of the Trades Councils "to ensure payment of the prevailing union wage" as a reason for the application of the rule of reason standard is simply another way of saying that special consideration should be given to this agreement because it involved union activity. This is inconsistent with the majority's own recognition that traditional antitrust principles must apply once the nonstatutory labor exemption is found to be inapplicable, and is inconsistent with this court's holding in *Consolidated Express, Inc. v. New York Shipping Association, Inc.*, 602 F.2d 494, and the Supreme Court's holding in *Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra.*

Further, the majority misperceives the thrust of the recent efforts to define more precisely the type of concerted refusals to deal which warrant *per se* treatment. It is true, as the majority suggests, that there is some resistance to application of a *per se* standard to all refusals to deal. But the leading academic commentators agree that a classic boycott, one which entails exclusionary conduct for economic benefit, merits *per se* treatment. *See, e.g.*, L. Sullivan, *Handbook of the Law of Antitrust* 256 (1977); 3 P. Areeda & D. Turner, *Antitrust Law* ¶836, at 351-52 (1978). What could be more exclusionary or fit more into the mold of a classic boycott than an agreement to exclude another firm (Muko and other non-union contractors) from a market (construction of Silver's restaurants) because it does not use union labor?

To be sure, it has not always been easy for the courts to apply the *per se* rule when the conduct itself could be considered to have a redeeming value. Thus, one might justify concerted refusals to deal when the effort is to eliminate design piracy, to prevent production of inferior work and insure ethical behavior, or to insure that potentially dangerous products are safe, useful and durable. But when met with each such rationale, the Supreme Court held that such potential justification does not warrant consideration of the combination by any standard less than the *per se* one applicable to concerted refusals to deal. *See Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978);[1] *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (per curiam).

There has been a recent group of cases, primarily those in connection with professional sports, where the courts have recognized that the necessity of combined action makes the field inappropriate for *per se* treatment. Obviously, if two clubs do not agree to be at the same field at the same time, to the exclusion of their competitors, there would hardly be a game in town. Other forms of combination within sports leagues are equally difficult to fit into the traditional antitrust analysis. *See, e.g., Molinas v. National Basketball Association*, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961). Antitrust professors delight in pushing their students to the outer limit of analysis by posing hypothetical (and some not-so-hypothetical) situations in which consumer boycotts are organized against grape growers, non-ERA states, or racial discriminators to test if the students are willing to

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1. Although the majority characterizes the *Professional Engineers* case as one decided under the rule of reason, the Supreme Court itself in Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (per curiam), included that case among those applying a *per se* rule.

apply a laxer antitrust standard in these situations than when businesses combine to refuse to deal with other businesses. Whatever the merits of making a distinction along these lines, it has no application in the present situation. Indeed, in the case of the type of agreement at issue here, akin to a hot cargo agreement, Congress has already determined its lack of redeeming value since, in the labor context, such an agreement is ordinarily banned. *See* NLRA §8(e); *Consolidated Express, Inc. v. New York Shipping Association, Inc.*, 602 F.2d at 524. Thus I disagree with both the majority's restrictive interpretation of the scope of the *per se* standard in antitrust cases and its failure to apply what have heretofore been traditional antitrust principles to combinations of labor and business which go far beyond labor's recognized exemption.

(2) The majority's second reason for applying the rule of reason here focuses on "the limited nature of the restraint" which "involved only one relatively small buyer: Silver's." The facts in this case simply do not fit into the majority's view of a single seller, a single buyer, and a single transaction. Arrayed on one side of the agreement were the Trades Councils representing all of the construction unions in six Pennsylvania counties, Allegheny County and the five surrounding counties. On the other side of the agreement was Silver's, which as of the trial date had constructed nineteen additional restaurants in the Western Pennsylvania area. At stake in the agreement was the considerable business represented by this construction, hardly similar to the single transaction to which we referred in *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978), cited by the majority. In *Sitkin*, which did not involve a classic agreement not to deal, the agreement found by the jury was one involving a sham bidding scheme for one transaction, the sale of scrap of a building damaged by a hurricane. That agreement did not fall within one of the categories which the

Supreme Court has held must be construed under the *per se* standard and was therefore one to be evaluated under the rule of reason standard.

In this case, on the contrary, the restraint of trade was not "limited", as the majority suggests, but was found by the jury to be directed to "non-union builders, including Muko" who were the object of the agreement not to deal. Thus, this case must be viewed in a light far different from that seen by the majority, even were we free to gloss over the precedent of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), where the Court stated of a concerted refusal to deal,

> [I]t is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.

Id. at 213 (footnote omitted).

Further, the majority's apparent view that *per se* analysis is inappropriate because only one "relatively small buyer" was involved is inconsistent with this court's opinion in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), also authored by Judge Adams, where we held that a manufacturer's withdrawal of its line of kitchen cabinets from the plaintiff dealer at the instigation of a competitor stated a *per se* violation of the antitrust laws. In *Cernuto* there was no "widespread restraint of trade;" indeed we recognized that the impact may solely have been in the market for that manufacturer's cabinets, rather than in the general market for kitchen cabinets. *Id.* at 166. Nonetheless, we rejected the contention that the rule of reason should be applied.

The jury's affirmative response to Interrogatory 1 reflects its finding that there was an agreement between Silver's and the Trades Councils. In *Muko I* we suggest-

ed how such an agreement should be viewed when we stated, in rejecting the defendants' contention that the evidence failed to support an antitrust claim,

> A factfinder could have found an agreement to exclude nonunion contractors from the Silver's construction market, a significant interstate market consisting of twelve construction projects. The premise of both the majority and minority opinions in *Connell* is that absent an exemption such an agreement may be the basis of a federal antitrust claim. The jury *might have found a concerted refusal to deal with a class of contractors of which Muko is a member.* But whether the evidence here is viewed as capable of sustaining *a finding of a group boycott, to which a per se rule would apply,* or some lesser restraint to which a rule of reason analysis might apply, it was sufficient to take Muko's case to the jury.

609 F.2d at 1376 (emphasis added). Once the jury found "a concerted refusal to deal with a class of contractors of which Muko is a member", it follows, as we previously recognized, that the agreement must be characterized as a group boycott and is one to which the *per se* rule applies.

(3) The third ground relied upon by the majority, that "the agreement did not have the necessary effect of destroying Muko's business", is legally irrelevant. The entire purpose of utilization of a *per se* rule is to avoid the necessity by plaintiffs to show the anticompetitive effects of the conspiracy. *See Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d at 166. The thrust of the inquiry must be directed to whether the agreement is one which falls within the category of agreements classified as *per se*, not whether anticompetitive effects have been shown in the specific case. As we stated in *Consolidated Express, Inc. v. New York Shipping Association, Inc.*, 602 F.2d at 523,

> If a *per se* violation has been established, the court will already have found that "the nature and *necessary effect*" of the challenged conduct is "plainly anticompetitive." *National Society of Professional Eng'rs v. United States*, 435 U.S. at 690, 98 S.Ct. at 1364 (emphasis added). Once that fact has been established, all that need be shown is that the charged anticompetitive acts were in fact performed by the defendant.

If application of the *per se* standard were to be limited to those cases in which plaintiffs have shown the anticompetitive effects of the conspiracy, there would be no need to establish any *per se* rule. The extent of injury, if any, suffered by Muko is evidence directed to the amount of damages to which he would be entitled rather than to the standard by which the conduct should be judged. The "necessary effect" of the agreement found by the jury, which was to exclude Muko and other non-union contractors from the construction of Silver's restaurants, is inevitably exclusionary. It thus falls within the category of "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality — they are 'illegal per se.' " *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

(4) The final ground relied upon by the majority, that "procompetitive effects were demonstrated" because Silver's gained a position in the otherwise crowded Pittsburgh-area fast food market, also cannot withstand analysis. The self-interest of Silver's, in avoiding union pickets and displeasure, is hardly synonymous with a "procompetitive effect". Even if there were evidence of such an effect, antitrust cases have always rejected the premise that a procompetitive effect in one market will excuse an anticompetitive effect in another. *See, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596,

609-11 (1972); *United States v. Philadelphia National Bank*, 374 U.S. 321, 370 (1963). During the almost 100 years of antitrust enforcement in this country, antitrust defendants have often sought to rationalize their conduct either on the ground that some benign and beneficent purpose is served or on the ground that competition, rather than being hurt, is enhanced. In the rare instances where the latter ground has been accepted as the basis for placing a class of agreements into the rule of reason category, the courts have not looked to whether the individual self-interest of one of the parties to the agreement would be served, as the majority does in this case, but to whether the competition that may flow from such agreements in general warrants a judgment that they could have economic utility. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-59 (1977). In contrast, the majority has proffered no legally cognizable basis for application of the rule of reason to an agreement not to use non-union contractors.

Since I believe none of the reasons given by the majority to support the use of a rule of reason standard when unions conspire with business to exclude a non-union firm from the market withstands analysis, I conclude that the underlying rationale for the majority's approach must stem from its discomfort with the application of traditional antitrust rules in the labor context. Judge Adams candidly set forth his concern in his concurring opinion in *Muko I*, 609 F.2d at 1376-77. While there may be some merit in that position, it is, as Judge Adams recognized, one which we, as an inferior court, are not free to take in light of the Supreme Court's decision in *Connell*. Further, were we free to examine the issue anew, I have grave question whether the extension of labor's exemption from the antitrust laws should be accomplished by the courts or whether it should not be left to Congress.

For the aforesaid reasons, I would reverse the judgment of the district court, and remand for retrial so that

the jury may apply a *per se* standard to the concerted refusal to deal which it already found existed and which it found extended beyond labor's nonstatutory exemption from the antitrust laws.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1696/7/8

LARRY V. MUKO, INC.,
Appellant in No. 81-1696

VS.

SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL AND LONG JOHN SILVER'S, INC. BUILDING COUNCIL OF PITTSBURGH, PA & VICINITY
Southwest Building Trades Council and Pittsburgh Building Trades Council,
Appellants in No. 81-1697
Long John Silver's, Inc.,
Appellant in No. 81-1698

(D. C. Civil No. 75-0979)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, VAN DUSEN and SLOVITER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on October 26, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 17, 1981, as rendered final March 4, 1981, be, and the same is hereby affirmed. Costs taxed against Larry Muko, Inc.

ATTEST:

SALLY MRVOS
Clerk

January 25, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1696/7/8

LARRY V. MUKO, INC.,
Appellant in No. 81-1696

v.

SOUTHWESTERN PENNSYLVANIA BUILDING & CONSTRUCTION TRADES COUNCIL, et al.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by Appellant, Larry V. Muko, Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Gibbons, Garth and Sloviter would grant the petition for rehearing.

By the Court,

ARLIN M. ADAMS
Circuit Judge

Dated: February 17, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1696/97/98

LARRY V. MUKO, INC.
VS.
SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL AND LONG JOHN SILVER, INC. BUILDING COUNCIL OF PITTSBURGH, PA & VICINITY
Larry V. Muko, Inc.,
Appellant in No. 81-1696
Southwest Building Trades Council and Pittsburgh Bldg. Trades Council,
Appellants in No. 81-1697
Long John Silver's Inc.,
Appellant in No. 81-1698

(D. C. Civil No. 75-0979)

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until March 26, 1982.

ARLIN M. ADAMS
Judge

Dated: March 1, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LARRY V. MUKO, INC., Plaintiff vs. SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, LONG JOHN SILVER'S, INC. AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PITTSBURGH, PENNSYLVANIA AND VICINITY Defendants	Civil Action No. 75-979

MEMORANDUM ORDER

Plaintiff Muko has moved for a new trial on issues of liability, as presented by Interrogatories Nos. 3 and 4 given the jury. The jury found an agreement between the Defendants, it found the agreement outside the labor exemption to the anti-trust laws, but in its Answer to Interrogatory No. 3 it did not find the agreement an unreasonable restraint. As instructed, the jury then made no finding as to the fact of damage.

The Plaintiff objects to the court's adoption of a rule of reason standard in its instruction and its refusal to instruct on a *per se* violation standard.

Plaintiff also objects to the court's admission into evidence of certain exhibits pertaining to the reasonableness or unreasonableness of Defendants' conduct and the court's instruction on this matter.

The court received trial briefs and heard argument on these matters before trial and made rulings thereon during the course of trial. It feels that no purpose would be served in rearguing these matters, the court seeing no reason for arriving at a different conclusion at this time.

NOW, THEREFORE, this 3rd day of March, 1981, Plaintiff's Motion for New Trial is DENIED, and the Conditional Motions for New Trial on behalf of all Defendents are DENIED as moot.

GERALD J. WEBER
Chief United States
District Judge

cc:
All counsel

November 7, 1973

Mr. James F. Lally
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Mr. Warren T. Walsh
Cement Masons' Building
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Pittsburgh, Pennsylvania 15212

Mr. Angelo A. Carboni
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Pittsburgh, Pennsylvania 15206

Gentlemen:

It was a pleasure meeting with you on Thursday Morning, November 1, in regard to our desire to establish good working relationships with the unions in the Greater Pittsburgh Area. I believe that our discussion was candid and clearly served to indicate that Long John Silver's, Inc., wishes to cooperate and work with the various labor unions and union contractors in the Greater Pittsburgh Area.

As I mentioned to you, the number of units that we plan to open in the Pittsburgh area will be in direct relationship to the success we obtain. This success will mean more union construction jobs.

I have studied the agreements that you gave me and find that they are written for a contractual relationship between local contractors and the various trade unions. I believe that we can serve the same purpose with this letter to show intent that Long John Silver's, Inc., plans to use only union contractors certified by the affiliated Building and Construction Trades Councils of Pittsburgh and Allegheny—Kiski Valley and vicinity. We will also

request that all the investors (property owners) developing for us use union contractors. By operating in this manner, we will accomplish a good working relationship with you. We have visited several of the contractors, the names of which we mentioned to you. As soon as we have firm bids on several construction sites, we will contact you to insure that these contractors are in good standing with the union.

In any relationship between two parties there must be mutual need and assistance. We would desire that the various labor and trade unions work very closely with us in recommending contractors that are willing to submit to us *reasonable* construction bids on our restaurants. It is also extremely important to both parties that our location at Monroeville, Pennsylvania and the one under construction in Lower Burrell Township, Pennsylvania not be subjected to any kind of informational picketing.

I will call Mr. Lally the first of next week to discuss the contents of his letter and our future relationship.

Respectfully,

LONG JOHN SILVER'S, INC.

JOSEPH P. SMAHA
Vice President—Development

JPS:vjf
cc: Paul Burkhart
Legal Dept.

Opposition

1

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY V. MUKO, INC.,
Petitioner,

v.

SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, LONG JOHN SILVER'S, INC., AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PITTSBURGH, PENNSYLVANIA AND VICINITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION FOR THE UNION RESPONDENTS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether, as the court below held, a non-exempt agreement between a company and a union is to be judged according to settled antitrust principles, including the principle that the *per se* rule of illegality applies where the facts warrant application of that rule, or, whether, as petitioner contends, all such agreements, including this exclusively vertical agreement, are *per se* violations of the antitrust laws even though exclusively vertical agreements in other contexts are judged under the antitrust law's rule of reason?

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§ 1 1

Supreme Court Rules

§ 17.1(a) 4

IN THE

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OCTOBER TERM, 1981

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LARRY V. MUKO, INC.,

Petitioner,

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SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, LONG JOHN SILVER'S, INC., AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PITTSBURGH, PENNSYLVANIA AND VICINITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION FOR THE UNION RESPONDENTS

COUNTERSTATEMENT OF THE CASE

The court below succinctly and fairly stated the facts on which this § 1 Sherman Act case went to the jury and on which the jury found that there was no unreasonable restraint of trade:

> Long John Silver's, Inc. ("Silver's"), a Delaware corporation headquartered in Lexington, Kentucky, operates fast food seafood restaurants in several

markets across the United States. In 1973, it decided to enter the Pittsburgh, Pennsylvania market, and contracted with Larry V. Muko, Inc. ("Muko"), a non-union general contractor experienced in constructing fast food restaurants, to build its first outlet in Monroeville, a suburb of Pittsburgh. After completion of the Monroeville restaurant, Silver's president Jim Patterson met with Larry Muko and indicated his willingness to give future construction business to Muko if his prices remained competitive and the quality of his construction remained good. Muko was awarded a contract to build a second restaurant in Lower Burrell, Pennsylvania, but Silver's did not commit itself any further.

During construction of the Monroeville restaurant, two labor organizations, the Southwestern Pennsylvania Building and Construction Trades Council and the Building and Construction Trades Council of Pittsburgh (the "Councils"), picketed the site. After completion of construction, handbills were distributed to customers of the Monroeville restaurant urging them not to patronize Silver's because the chain used "contractors who are paying less than the established prevailing wages in the area." Appendix 115a. The handbill exhorted the customers "to protect the living and working standards established by the Building Trades Council." *Id.*

Silver's management was alarmed when it was informed that customers were leaving the premises after reading the handbill. In response to the leafletting, Silver's arranged a meeting with the Building Trades Councils. After the meeting, Silver's vice-president sent a letter to the Councils emphasizing the company's "desire to establish good working relationships with the unions in the Greater Pittsburgh Area" and stating Silver's "intent . . . to use only union contractors certified by the [Councils]" in the future. The letter concluded: "In any relationship between two parties there must be mutual need and assistance. . . . It is . . . extremely

important to both parties that our location at Monroeville, Pennsylvania and the one under construction in Lower Burrell Township, Pennsylvania not be subjected to any kind of informational picketing." Appendix at 116a-117a.

Subsequently, Silver's employed only unionized general contractors to build its Pittsburgh-area restaurants, although the general contractors were free to use non-union subcontractors. Silver's discussed with Muko the question whether Muko would be willing to bid on the construction of its restaurants as a union firm. Muko declined to build under such circumstances, however, and it was not awarded any of Silver's contracts after the construction of the Lower Burrell restaurant. [Pet. App. 2a-4a.]

ARGUMENT

The court below rejected Muko's contention "that every labor-antitrust case in which the labor exemption is found to be inapplicable should be [governed by] the per se standard [of antitrust liability]." (Pet. App. 10a.) Instead the court concluded

> that, once it is ascertained that union activity falls outside the protection of the labor exemption, a court must apply traditional antitrust principles in determining whether the activity in question violates the antitrust laws. In most cases the rule of reason will supply the measure of illegality; the *per se* rule may, however, be invoked where appropriate. [Pet. App. 12a.]

As we show in point 1 of our argument, no court of appeals has disagreed with that all but self-evident proposition. And, while the question of whether the jury and the court below properly applied settled antitrust principles to the facts of this case is not the type of question this Court sits to resolve, in point 2 of our argument we show that judgment was properly entered for the defendants.

1. There Is No Conflict In The Circuits

Despite petitioner's claim (Pet. 14-16) that the decision below is contrary to an earlier decision within the same circuit (*Consolidated Express Inc.* v. *New York Shipping Assn.*, 602 F.2d 494 *vacated and remanded*, 448 U.S. 902, *on remand* 641 F.2d 90), and with a decision of another circuit (*South-East Coal Co.* v. *Consolidated Coal Co.*, 434 F.2d 767 (C.A. 6) *cert. denied*, 402 U.S. 983), it is patent that there is *no* conflict in the lower courts.

(a) Initially, of course, a conflict within a circuit as opposed to a conflict between circuits is not one of the bases stated in Rule 17.1(a) of the Rules of this Court for the grant of a writ of certiorari. The appropriate means of resolving a genuine intra-circuit conflict is rehearing en banc. Moreover, while this is not acknowledged in its petition for certiorari Muko cited to the court below the portion of *Consolidated Express* quoted at p. 14 of its petition. That court noted that *Consolidated Express* (*Conex*) "concluded" that " 'settled antitrust principles' would be 'appropriate and applicable' to activity found to be nonexempt . . . Those 'settled' principles include the *per se* rule, *where the facts warrant its application.* 602 F.2d at 522-23 (emphasis added [by the court below])." (Pet. App. 8a). And from that predicate the lower court then responded as follows:

> Although the language [quoted by Muko] appears to support Muko's contention, the actual holding in *Conex* is far narrower in scope. In *Conex*, in fact, this Court carefully analyzed the conduct in question before determining that it constituted a *per se* illegal group boycott. *See* discussion in part III(b) *infra.* Indeed, the Court suggested that had procompetitive effects been shown, the boycott may have been removed from the category of *per se* violations. *See* 602 F.2d at 524 n.18 and accompanying text. As the *Conex* majority points out, "public interest"

> considerations, such as the advancement of labor policy, are not proper subjects for examination under the rule of reason. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978). The passage from *Conex* quoted above merely reflects the view that it is unnecessary, if not improper, to weigh "labor's legitimate interest in the collective bargaining process" twice—once in determining the labor exemption and again in deciding the antitrust liability question. . . . There is no indication that the Court was prepared to find that the defendants' conduct was *per se* illegal merely because it was not exempt from the antitrust laws. [Pet. App. 8a-10a.]

Thereafter Muko petitioned for rehearing en banc asserting the alleged conflict between the decision below and *Consolidated Express* and that petition for rehearing was denied.

Thus, petitioner's intra-circuit conflict claim is the one tendered below and rejected as a misreading of *Consolidated Express*. And, in attempting to resuscitate that claim here, the petition does not even tender a rebuttal, much less a reasoned and persuasive response, to the portions of the decision below carefully explaining how Muko has misread *Consolidated Express*.

(b) In its effort to create a conflict where there is none, Muko also takes a portion of *South-East Coal Co.* out of context. In that case the Sixth Circuit first quoted from the portion of *Mine Workers* v. *Pennington*, 381 U.S. 657, 666 stating:

> [W]e think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.

And immediately thereafter that Court of Appeals explained:

> The conclusion which can be drawn from *this language* is that when a labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint under the antitrust laws. [But see the interpretation given this language by Judge Peck in Lewis v. Pennington, 400 F.2d 806, 813-814 (1968) and by District Judge Wilson in Ramsey v. United Mine Workers, 265 F.Supp. 388, 399 (1967)]. Thus, if it could be shown that in this case the Union entered into a conspiracy with certain large coal operators to impose agreed upon wages and royalties upon smaller, non-union coal producers, regardless of their ability to pay and regardless of whether or not the Union represented the employees of these smaller companies, all for the avowed purpose of eliminating them from the business, limiting production and pre-empting the market for the larger, unionized coal producers this conspiracy would be a per se unreasonable restraint of trade or competition. [434 F.2d at 775.]

Plainly *South-East Coal Co.* does not stand for the rule contended for by Muko—that all agreements not entitled to the labor exemption are *per se* violations of the antitrust laws. Rather the Sixth Circuit follows the rule stated in *Consolidated Express* and in the decision below—that the legality of such agreements is to be judged according to "settled" antitrust principles, including the "per se rule where the facts warrant its application" (Pet. App. 8a)—and in applying that rule has reached the unexceptionable conclusion that a *Pennington*-type conspiracy in which "one group of employers . . . conspire[s] to eliminate competitors from [an] industry" (381 U.S. at 666) does justify appli-

cation of the *per se* rule of illegality. As the court below recognized and as we explain below such classic group boycotts are entirely distinct from the agreement here.[1]

2. The Decision Below That Muko Failed to Show A Practice Illegal Per Se Under the Antitrust Laws Is Correct

Muko's argument on the merits, as we understand it, is that the agreement between Silver's and the Trade Councils concerning the building contractors with whom Silver's would contract to build Silver's retail outlets is a concerted refusal to deal, illegal *per se* under the antitrust laws. (Pet. 16-18)[2] The court below, following this Court's guidelines, properly rejected that claim.

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[1] *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, Supreme Court No. 81-334 (petition for certiorari granted January 11, 1982) cited at Pet. 8-9, 15, like *Pennington*, concerns the extent to which the *labor exemption* protects agreements between one group of *competitors* to eliminate another group of competitors from an industry. Thus the issues in that case have nothing to do with the question presented here as to the *substantive* antitrust standard applicable to *vertical*—as opposed to horizontal—agreements alleged to be in restraint of trade.

[2] In its petition (at pp. 10-13) as in its argument to the court below Muko embellishes its antitrust claim with the contention that Congress in passing the Taft-Hartley and Landrum-Griffin amendments to the NLRA demonstrated an intent to make all agreements such as that here unlawful *per se* under the antitrust laws. But as the passages Muko quotes show on their face, nothing Congress said or did in shaping the labor laws even purports to address the Sherman Act substantive rules for judging the legality of conduct outside the labor exemption to the anti-trust laws. As the court below properly stated:

> We are . . . unpersuaded by Muko's recitation of the legislative history of § 8(e) of the NLRA, (the so-called "hot cargo" provision) which indicates Congress' intent to make hot cargo agreements illegal *per se* under the labor laws. . . . Even

The agreement between Silver's and the Trade Councils found by the jury here is one of the myriad possible vertical non-price agreements—agreements between entities operating in different markets—affecting a company's buying decisions. In *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, the most recent decision concerning such an agreement—there between a manufacturer and a retailer barring the retailer from selling franchised products from locations other than those specified in the agreement—the Court rejected the claim that the *per se* rule of antitrust liability should apply. In so doing the Court emphasized:

> [W]e do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pac. R. Co.* [v. *United States*, 356 U.S. 1, 5] But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing. . . . When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act. [433 U.S. at 58-59.]

The agreement in *Continental T.V.*, like franchise agreements generally (see, e.g., *White Motor Co.* v. *United States*, 372 U.S. 253, 255), limited the customers to whom the retailer could sell. Thus, franchise agreements no less than the agreement here come within the

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assuming that the defendants' conduct would be deemed illegal under § 8(e), we see no reason to presume that Congress intended the same conduct to be ipso facto violative of the antitrust laws, which were enacted at a different time, for a different purpose, and which provide for sharply different relief. See *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 634 (1975). [Pet. App. 11a, n.5.]

category of "concerted refusals to deal." *Continental T.V.'s* holding that the rule of reason applies therefore demonstrates that vertical agreements within that category are not inevitably *per se* antitrust violations. Thus, the court below was correct in rejecting Muko's claim that the rule governing *horizontal* group boycotts—*viz.* agreements between competitors not to deal with third parties—applies here and renders the Silver's-Trades Councils agreement unlawful *per se*. As that court stated:

> A distillation of the facts at issue here makes it clear that this is not a classic group boycott; the defendants' conduct should not be proscribed until the factfinder has been given the opportunity to determine its reasonableness. Simply put, a small retailer has been picketed by a union. To preserve its business, the firm agrees to purchase union-made goods or services in the future. . . . [N]either Silver's nor the Trades Councils was in competition with each other or with Muko. There is no evidence that Silver's goal was to affect Muko's business; rather, it is uncontradicted that Silver's sought only to retain the goodwill of its customers in a new market. The Councils' goal was to ensure payment of the prevailing union wage to Pittsburgh-area construction workers. [Pet. App. 21a.]

And, Muko has not even suggested any basis other than the rule governing "classic group boycotts" for finding a *per se* violation or for overturning the jury's answer to the following special interrogatory:

> Was the agreement between Long John Silver's and the Trade Councils an unreasonable restraint of trade under the standards given you by the court in its instructions?

The jury's answer, on proper instructions, was "No." The Court of Appeals' refusal to disturb that verdict raises no issue warranting further review.[3]

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[3] Although the Court of Appeals meticulously confined its decision to the circumstances of this case, *amicus curiae* Associated Builders

CONCLUSION

For the above stated reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(Counsel of record)

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and Contractors, Inc. (ABC) seeks to find a broad general principle in that decision. ABC urges that it is a *per se* violation of the antitrust laws for a union and a purchaser of construction services to enter into an agreement whereby the latter does not deal with contractors who "do not operate under collective bargaining agreements with any labor organization" (ABC Br. ii)—*viz.*, with contractors who, on principle, violate § 8(a)(3) of the National Labor Relations Act. ABC's view of the antitrust laws is as perverse as its view of the labor laws. As shown in point 2 of this brief in opposition, ABC's assertion that "this Court has repeatedly adjudged as per se illegal the generic classification of boycotts or refusals to deal, irrespective of their particular form" (ABC Br. 7) is squarely refuted in *Continental T.V.* Indeed, as the Court there recognized, all the cases cited by ABC at p. 7 of its *amicus curiae* brief involved horizontal agreements, see particularly 433 U.S. at 58, n. 28:

> There may be occasional problems in differentiating viertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal *per se*, see, *e.g.*, *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *United States* v. *Topco Associates, Inc.*, *supra*, but we do not regard the problems as proof as sufficiently great to justify a *per se* rule.

Opposition

2

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CLERK

No. 81-1798

IN THE

Supreme Court of the United States

October Term, 1981

LARRY V. MUKO, INC., Petitioner,

v.

SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, LONG JOHN SILVER'S INC., AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PITTSBURGH, PENNSYLVANIA AND VICINITY, Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit At Nos. 81-1696, 1697, 1698

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 10, 1982

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Must a court conclusively presume that a small retailer that buys construction services as an incident to its restaurant business has engaged in an unreasonable restraint of trade when it agrees with a labor union to contract for construction services only with union firms; or should the court and jury consider such factors as the precise effect of the agreement on the business of non-union contractors, the portion of the total available construction work affected by the agreement, any procompetitive effects in the retailer's line of business from its use of union contractors, and the objectives of the retailer and the union in entering into the agreement?

LIST OF PARTIES AND CORPORATE AFFILIATIONS

The parties are those set forth above in the caption. All of the capital stock of Long John Silver's, Inc. is owned by Jerrico, Inc., a Kentucky corporation, whose stock is traded in the over-the-counter market. Neither Long John Silver's, Inc. nor Jerrico, Inc. has any affiliates or any subsidiaries other than wholly-owned subsidiaries.

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OPINIONS OF THE COURTS BELOW

The opinion of the Third Circuit cited to unofficial reports in the Petition for Writ of Certiorari has now been officially reported at 670 F.2d 421 (3d Cir. 1982). In addition to this opinion, the Third Circuit *en banc*, in a prior appeal by the present petitioner, issued an opinion reversing a directed verdict against petitioner in a first trial. 609 F.2d 1368 (3d Cir. 1979). There was no opinion by the District Court in that first appeal.

COUNTERSTATEMENT OF THE CASE

Larry V. Muko, Inc. ("Muko") is a general contractor engaged primarily in the construction of small commercial buildings in the Pittsburgh, Pennsylvania area. Long John Silver's, Inc. ("Silver's") is an operator and franchisor of seafood fast food restaurants. Silver's entered the Pittsburgh restaurant market in 1973 and in 1977 accounted for less than 1% of restaurant sales in that market. 1359a; 125a.[1] One hamburger restaurant chain, McDonald's, sells more fish than Silver's. 1380a. The two respondent Building Trades Councils represent various construction trade and craft unions in and around Pittsburgh.

Muko claims that Silver's and the Building Trades Councils agreed in violation of the antitrust laws that Silver's would engage only union contractors to build Silver's Pittsburgh area restaurants. At a first trial in 1977, Judge Joseph P. Willson of the District Court for the Western District of Pennsylvania directed a verdict

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1. This citation and similar ones hereafter refer to a page of the Appendix or Supplemental Appendix submitted by the parties to the Third Circuit Court of Appeals.

against Muko. The Third Circuit reversed and remanded for a new trial. 609 F.2d 1368 (3d Cir. 1979).

At a second trial in February 1981 before Chief Judge Gerald Weber, after seven full days of testimony on liability issues only, a jury considered special interrogatories. It concluded that Silver's and the Councils in 1973 entered into an agreement that Silver's would use only union contractors to build its Pittsburgh area restaurants. Despite the absence of any evidence of the exclusion from Silver's construction of any non-union contractor who paid prevailing wages, the jury further found that this agreement had effects on competition beyond the effect of eliminating wage competition among contractors.

The jury finally found that this agreement between Silver's and the Councils did not unreasonably restrain trade.[2] The jury reached this conclusion based upon a rule of reason instruction the content of which was upheld by the Third Circuit Court of Appeals and is not challenged here. Muko contends instead that no rule of reason instruction should have been given at all—that is, that a *per se* rule of liability was appropriate.

Both Chief Judge Weber in the District Court and the Third Circuit rejected this contention based upon the facts proven at trial. The Third Circuit opinion summarizes these facts as follows, Appendix to Petition at 21a-22a:

> A distillation of the facts at issue here makes it clear that this is not a classic group boycott; the defend-

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2. Because of this conclusion, the jury never reached the fourth liability interrogatory, which asked whether the agreement caused Muko any injury to its business or property ("injury in fact").

ants' conduct should not be proscribed until the factfinder has been given the opportunity to determine its reasonableness. Simply put, a small retailer has been picketed by a union. To preserve its business, the firm agrees to purchase union-made goods or services in the future. We cannot agree with Muko or the dissent that this is the kind of behavior against which the *per se* rule traditionally has been invoked. Unlike *Klor's* and *General Motors*, this is not a case in which one competitor, through concerted action with a supplier or customer, attempts to cut another, horizontal competitor out of the marketplace. Nor is there any suggestion of attempted price-fixing, as in *Cernuto*. Notwithstanding the dissent's assertion, which is not grounded on record evidence, that Muko "must be viewed as the representative of non-union labor," the fact remains that neither Silver's nor the Trades Councils was in competition with each other or with Muko. There is no evidence that Silver's goal was to affect Muko's business; rather, it is uncontradicted that Silver's sought only to retain the goodwill of its customers in a new market. The Councils' goal was to ensure payment of the prevailing union wage to Pittsburgh-area construction workers. The record is barren of anything to suggest that either of the defendants wished, through their concerted action, to gain an advantage over Muko in an *economic* or *competitive* sense.

The record contains no evidence that the handbilling by the Councils or the agreement between Silver's and the Councils was induced, encouraged, promoted or secured by any contractor who was in competition with Muko.

The evidence upon which this summary of the facts is based and upon which the jury could have based its

conclusion that there was no unreasonable restraint of trade includes at least these salient points:

—The market affected by the agreement was all small commercial construction in the Pittsburgh area. 405a-406a; 418a-419a; 886a-887a.

—Silver's accounted for an unspecified but tiny portion of this construction. 125a; 618a-619a; 1448a-1449a.

—Muko had no difficulty securing other small commercial construction work, including but not limited to the construction of all Pittsburgh area Pizza Hut and Kentucky Fried Chicken restaurants and many Speedy Muffler King garages. 118a; 406a-412a; 431a; 471a-472a; 654a-655a.

—Muko had higher sales after 1973 than before and had higher gross profits every year after 1973 than before. 127a.

—No general contractor but Muko was affected by the agreement; and non-union subcontractors were not affected—that is, they could and did work on Silver's construction projects. 884a-885a; 1061a-1062a.

—At the time of the agreement, Silver's had been in business only four years, had never entered a major market outside the South and considered success in entering the Pittsburgh market to be crucial to its hopes for expansion into new markets. 816a-818a; 826a; 1355a-1357a.

—Silver's principal interest in 1973 and 1974 was with successfully entering the Pittsburgh restaurant market where two seafood competitors and many other fast food competitors were al-

ready firmly established. 441a; 826a; 1359a; 1443a-1450a.

—In 1973, Muko built Silver's first two Pittsburgh area restaurants. 183a-184a; 242a; 250a; 262a-263a.

—Silver's lost patronage following truthful handbilling of its customers by the Councils advising the customers that Muko paid its employees less than prevailing wages. Muko in fact paid its employees far less than prevailing wages—approximately $4 per hour less in 1973. 126a; 826a; 914a; 1014a-1015a; 1361a.

—Silver's used only union contractors in order to avoid the loss of business and the threat to its market entry posed by lawful handbilling of Silver's customers by the Councils protesting Muko's substandard wage levels. 199a-200a; 829a; 1362a.

—Silver's follows a unilateral policy in other major metropolitan markets where unions are strong of using only union contractors; and certain other restaurant operators in the Pittsburgh area had adopted a policy—not as part of any agreement with unions—to use only union contractors. 400a; 428a-430a; 955a-957a; 1367a-1368a; 1436a.

Reviewing this record, the Third Circuit Court of Appeals concluded that, without regard to the availability of the labor exemption, it would have been improper to apply a *per se* rule of antitrust liability to the agreement found by the jury. Appendix to Petition at 21a and 23a.

The Court of Appeals never reached Silver's contention that there was no evidence to support the jury's finding that the agreement had competitive effects going beyond the effect of eliminating competition over wages, hours and working conditions. The Third Circuit also never reached Silver's contention that there was no evidence sufficient to support a finding that Muko suffered "injury in fact" within the meaning of the antitrust laws.

Neither the Third Circuit nor the District Court ever held that Silver's agreement with the Councils violated federal labor laws. Muko has not pursued any federal labor law remedies for the conduct it alleged here.[3]

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3. An amicus curiae brief proffered to this Court by the Center on National Labor Policy recites at least two facts not supported by the record: that Silver's entered into a contract with Muko after the Councils' handbilling and before the agreement with the Councils (page 3 of that brief) and that the additional cost of constructing its restaurants with union contractors was $225,000 (p.4). The evidence in fact was that the handbilling occurred after Muko had begun construction of Silver's second Pittsburgh restaurant. 264a-265a. There is no evidence that union construction was more expensive than Muko construction or that Silver's paid more for the construction of its restaurants than it would have if Muko had built them.

REASONS FOR DENYING THE WRIT

I. In Its Present Posture, In Which The Principal Issue Is Whether To Apply A Per Se Rule Of Illegality And In Which There Has Been No Finding Of A Labor Law Violation, This Case Is Simply One Of The Numerous "Boycott" Cases Routinely Decided In The Lower Courts After Consideration Of A Detailed Factual Record.

This case in its present posture presents no significant issue of antitrust or labor law or of the reconciliation of these two bodies of law. The posture of the case is that the labor exemption issue has been resolved, adversely to the defendants, and the two lower courts have proceeded to apply traditional antitrust analysis to the non-exempt conduct.

Muko in its petition purports to find a significant issue in the question whether every "hot cargo agreement" in violation of section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), is also a *per se* violation of the antitrust laws, exposing the parties to treble damage liability on top of any liability under the labor laws. For Muko, the answer to this question is "Yes."

By adopting a rule of reason approach, the lower courts refused to reach this draconian result while at the same time leaving open a substantial possibility of treble damage liability in any case where a hot cargo agreement also has a substantial anticompetitive effect. No labor union and employer can, under the Third Circuit opinion, enter into a hot cargo agreement without running a substantial risk of treble damage liability. Moreover, the Third Circuit opinion endorses the use of a *per se* rule where a union agrees with one competitor not to do business with another competitor or where a union

reaches agreement with a group of competitors. Appendix to Petition at 7a-8a.

The Third Circuit decision does not give an antitrust blessing to hot cargo agreements. It simply imposes upon a plaintiff who wishes to recover treble damages a requirement of proving to a court or jury that the agreement seriously offended the competitive market interests protected by the antitrust laws. To argue otherwise misconstrues the rule of reason—which is the presumptive and ordinary method of antitrust analysis[4]—as a *per se* rule of non-liability.

Muko's argument about Congressional intent to establish *per se* illegality of hot cargo agreements through the enactment of section 8(e), Petition at 10-12, was fully answered by the Third Circuit when it held, Appendix to Petition at 11a n.5:

> Even assuming that the defendant's conduct would be deemed illegal under § 8(e), we see no reason to presume that Congress intended the same conduct to be ipso facto violative of the antitrust laws, which were enacted at a different time, for a different purpose, and which provide for sharply different relief. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 634 (1975).

This language of the Third Circuit points to an additional substantial reason why this is not an appropriate case for reaching the question Muko presents in its petition. The question on which Muko seeks a writ of certiorari assumes the agreement between Silver's and the

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4. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977).

Councils was "in violation of Section 8(e) of the National Labor Relations Act . . . ." Petition at i.

In fact, there has been no holding by any court in this case that the agreement violates section 8(e). As the foregoing quotation reveals, the Third Circuit assumed an illegal agreement for purposes of its opinion. Whether in fact the agreement found by the jury violates section 8(e) was not decided either in the District Court or the Third Circuit.

Because this case presents no important issue either of federal labor law or antitrust law but instead is subject to resolution only on its particular facts and because the record does not support the assumptions stated in the Question Presented, Muko's petition for writ of certiorari should be denied.

II. There Is No Conflict Among The Circuits On The Issue Presented By Muko's Petition.

The principal case law conflict identified by Muko is between decisions within the Third Circuit. Petition at 14-15. The panel majority discussed the question at length and saw no conflict (Appendix to Petition at 6a-12a), nor, presumably, did the eight judges on the Third Circuit who voted to deny rehearing. A conflict within a circuit in any event does not create a need for action by this Court. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

Neither the Sixth Circuit decision in *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971), nor the Ninth Circuit decision in *California State Council of Carpenters v. Associated General Contractors of California*,

Inc., 648 F.2d 527 (9th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3528 (U.S. Jan. 11, 1982) (No. 81-334), is in conflict with the Third Circuit's decision here.

In *South-East Coal*, a non-union coal operator alleged that competing coal operators conspired with the United Mine Workers to impose union wages upon the non-union operator or, failing that, to drive the non-union operator out of business. For purposes of deciding whether to use a rule of reason, *South-East Coal* is easily distinguishable from this case, where no competitor of Muko is joined in conspiracy with a union and where the evidence discloses no anticompetitive objectives.

The Ninth Circuit in *Associated General Contractors* did not call for the application of a *per se* rule, even though it had before it an alleged agreement distinctly different and more clearly anticompetitive than that found by the jury in this case. The Ninth Circuit did not address the issue. Its only reference to the antitrust consequences of the conduct alleged was in dicta and was a statement that the agreement among competitors alleged in the complaint "is very similar to a concerted refusal to deal or a group boycott, which have both been held to constitute Sherman Act violations." 648 F.2d at 531. Ruling on a motion to dismiss a complaint, and not a full trial record, the Ninth Circuit found in the complaint allegations of a widespread conspiracy in which "an important construction industry employers' organization" and other industry employers agreed to boycott unionized subcontractors. The present case, in contrast, shows only one small consumer of construction services agreeing to engage only union contractors, and does not

show that Silver's ever acted in concert with any of its or Muko's competitors.[5]

District courts and courts of appeals have on hundreds of occasions dealt with the proper scope of the *per se* rule against group boycotts. Far from being inconsistent with these decisions, the Third Circuit's decision carefully took account of many of those decisions and found its result to be fully in accord with them. Appendix to Petition at 13a-21a. Thus, there is no occasion for this Court to resolve a dispute among the lower courts.

III. The Rulings Of The Courts Below Are Entirely Consistent With This Court's Decisions.

As it did with the decisions of sister courts, the Third Circuit reviewed applicable decisions of this Court and found its ruling here to be consistent with this Court's holdings. Appendix to Petition at 13a-17a and 22a-23a. The Third Circuit found comfort for its decision in all of this Court's boycott cases relied upon by Muko in its petition, except for *Paramount Famous Corp. v. United States*, 282 U.S. 30 (1930), which was not cited by the Third Circuit at all. *Paramount Famous* involved an agreement by competing film distributors controlling in excess of 60% of the entire film business in the United States not to deal with any exhibitors who refused to comply with a standard contract provision requiring arbitration of disputes. Since it involved an agreement among competitors to refuse to deal, that case is plainly distinguishable from the facts considered here by the jury and the two lower courts.

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5. *Morse Bros., Inc. v. International Union of Operating Eng'rs*, 1974-2 Trade Cas. ¶ 75,412 (D. Ore. 1974), also cited by petitioner, is not inconsistent with the Third Circuit opinion here. *Morse* concerned a union agreement

That the Third Circuit decision is not inconsistent with any decision of this Court is also plain from the face of this Court's opinion in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), where this Court specifically declared that it was not deciding whether the agreement there in question violated the Sherman Act. *Connell* did not consider the appropriate standard of antitrust review. *Id.* at 637.

IV. Resolution Of The Question Presented For Review By Muko Will Not Change The Outcome In This Action, In View Of Alternative Grounds Not Reached By The Third Circuit That Support Judgment For The Defendants.

Were this Court to reverse the Third Circuit on the Question Presented by Muko, that ruling would not affect the judgment in favor of Silver's and the Councils. On other meritorious grounds, the judgment of the Third Circuit is correct, without regard to the question presented by Muko. Because of its decision on the rule of reason issue, the Third Circuit did not find it necessary to reach these arguments.

The first alternative basis for affirming the judgment of the Third Circuit is that the evidence did not support the jury's finding in Special Interrogatory 2 that the agreement between Silver's and the Councils had effects

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requiring the employer to subcontract only to subcontractors who were under contract with the union. The *Morse* court applied a *per se* rule of liability to this agreement, but not on the basis of any automatic use of the *per se* rule. The *Morse* court did not say that failure to comply with the conditions of the labor exemption required use of a *per se* rule, as Muko contends. Rather it held "that once the labor exemption has been found inapplicable, then the Sherman Act applies just as it would to agreements in contexts other than labor relations." ¶ 75,412 at 98,359-98,360.

going beyond the effect of eliminating competition over wages, hours and working conditions.

In Muko's first appeal, the Third Circuit *en banc* was obliged to "assume that Muko was paying [its] employees prevailing rates" because Muko had made a rejected tender of proof to that effect. 609 F.2d at 1372. The evidence on the first appeal also was that Muko's bids for Silver's construction projects would have been below the amount Silver's actually paid for construction of its restaurants. Taken together, this evidence would have proven an adverse effect on competition going beyond the effect of elimination of competition over wages.

Upon retrial, Muko did not prove that it paid prevailing wages or that its bids for Silver's construction would have been lower than the prices actually paid. The only wage evidence was that Muko regularly paid substantially less than the prevailing wage. DX14, 126a; DX17; 1014a-1015a. Muko's hypothetical bids were stricken from evidence as totally unreliable. The record did not reveal that Muko was in any way more efficient than any other contractor or that it had any competitive advantage beyond low wage rates. 236a-240a; 397a-399a; 455a; 598a; 858a-863a; 874a; 880a-884a.

There was no other evidence to support the jury's conclusion that an agreement between Silver's and the Councils had competitive effects beyond the effect of eliminating wage competition. Without evidence that Muko paid prevailing wages and that Muko's bids would have been less than actual contract prices, the jury could only speculate in deciding whether an agreement between Silver's and the Councils had any effects that would not have resulted from elimination of wage competition.

A second alternative basis for the Third Circuit judgment is that Muko failed to present sufficient evidence to show that it suffered any injury in fact as a result of the agreement. This was the subject of Special Interrogatory 4, which the jury never reached because of its conclusion that the agreement did not unreasonably restrain trade.

A directed verdict was appropriate on the injury in fact question because the record shows no injury to Muko's business or property. The evidence showed that Muko's profits were higher every year after 1973 (the year of the agreement) than before. 127a. The evidence also shows that Silver's let its contracts on bid. There is no evidence that Muko's bids would have been lower than the accepted bids.

In Muko's first appeal, the *en banc* Third Circuit rejected the contention that Muko made an insufficient showing of injury to his business or property because the first trial court below had accepted into evidence the hypothetical bids Muko prepared regarding the Silver's restaurants that it claimed it would have built. 609 F.2d at 1371-72 & 1376. After cross-examination on retrial, the District Court struck them from the record, leaving no evidence that Muko would have been awarded any of the Silver's contracts. 906a. Muko has not appealed this ruling.

In the absence of bids or other evidence showing that Muko would actually have obtained even one of the Silver's construction contracts in dispute, the jury could not as a matter of law have found that Muko suffered any injury in fact. In *M. C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1064-65 & 1068 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976), the Fifth Circuit rejected plaintiff's hypothetical bids as proof that plaintiff would have obtained a disputed sales contract and re-

versed the trial court's judgment in favor of plaintiff for lack of probative evidence of fact of damage. *Accord, Ovitron Corp. v. General Motors Corp.*, 364 F. Supp. 944, 948 (S.D.N.Y. 1973), *aff'd per curiam*, 512 F.2d 442 (2d Cir. 1975).

Muko claims that James A. Patterson, then President of Silver's, promised Muko the chance to build further restaurants after Muko's satisfactory completion of the first Pittsburgh area Silver's restaurant, but the record is clear that this comment did not constitute a commitment. It was viewed by all parties, including Muko, merely as part of the negotiation process for the award of a construction contract on the second restaurant. 215a-216a; 262a; 438a-439a; 763a.

Thus, there was no evidence sufficient to support a finding of injury in fact, and the judgment of the Third Circuit would for that reason be affirmed.

CONCLUSION

For the foregoing reasons, Muko's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Amicus Brief

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Associated Builders and Contractors, Inc. ("ABC") respectfully moves this Court pursuant to Rule 36 of the Rules of this Court for leave to file a brief *amicus curiae* in support of

the instant petition for a writ of certiorari.[1] In support of this motion the ABC states as follows:

1. The Associated Builders and Contractors, Inc. is a national trade association of approximately 17,000 construction companies and distributors of construction supplies. ABC member contractors are primarily "open shop," that is they do not operate under collective bargaining agreements with any labor organization. However, ABC and its members are wedded to the "Merit Shop" concept which has as its fundamental premise that the opportunity to perform construction work should be based on performance, cost, and other competitive factors without restraints relating to contractors' union or non-union status. As merit shop contractors, ABC member companies subcontract work to, and work on construction jobsites with, other companies irrespective of their union or open shop status.

2. ABC member companies perform commercial, residential, and industrial construction. Commercial construction, including the construction of fast food restaurants similar to that involved in this case, accounts for the lion's share of ABC members' work. Such construction is performed by 85% of all ABC member companies. For more than 40% of ABC member contractors, commercial construction comprises more than half of their business.

3. The decision of the Court below — that a union and a restaurant chain may conspire to boycott non-unionized con-

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[1] Pursuant to Rule 36.1 of the Rules of this Court, the ABC requested consents from all parties to the filing of a brief *amicus curiae* in support of the petition for a writ of certiorari. Counsel for Respondent Long John Silver's Inc., and counsel for Respondents Southwestern Pennsylvania Building and Construction Trades Council and Building and Construction Trades Council of Pittsburgh, Pennsylvania and Vicinity both declined to give such consent. No reasons were given for withholding the consents. Counsel for Petitioner stated his consent.

tractors from building new restaurants for a large restaurant chain — is of vital importance and utmost concern to ABC members. Because ABC member contractors are open shop contractors and perform substantial amounts of restaurant and commercial construction, they, along with Muko, were the target of Respondents' boycott. If the lower Court's decision is not reversed by this Court, ABC members will be the principal casualties of Respondents' boycott and similar arrangements that assuredly will develop nationwide. It is, therefore, essential that ABC be permitted, as an *amicus curiae*, to present its views to this Court so as to acquaint the Court with the impact of the Court's decision on the operations of the ABC membership.

4. The Petitioner in this case is not a member of ABC and is a single, unaffiliated construction company. Hence, it is unlikely that Petitioner, albeit a victim of the Respondents' agreement, will be able to adequately present to the Court the arguments and concerns of the ABC membership.

For all the foregoing reasons, the Associated Builders and Contractors, Inc. respectfully requests leave to present its view to this Court by filing a brief *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1798

LARRY V. MUKO, INC.,

Petitioner,

v.

SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, LONG JOHN SILVER'S INC, AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PITTSBURGH, PENNSYLVANIA AND VICINITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

This brief *amicus curiae* on behalf of the Associated Builders and Contractors, Inc., is submitted contingent upon the Court's granting the accompanying Motion For Leave To File Brief Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

The interest of the Associated Builders and Contractors, Inc. is set forth in its annexed Motion For Leave To File Brief Amicus Curiae.

REASONS FOR GRANTING THE WRIT

The decision below places a judicial imprimatur on an organized boycott of classical anticompetitive dimensions. Respondents' refusal to deal was specifically found by the jury to target not simply Petitioner, Muko Construction Company, but all non-union construction companies. The agreement, therefore, eliminated all 17,000 ABC members from the possibility of constructing any of Long John Silver's fast food restaurants.

The exclusion of these companies arose not for any reason pertaining to their prices, efficiency, business reputation or any other competitive reason. Rather they were quarantined from Long John Silver's construction work solely because of their non-union status and because of Respondents' desire to turn Long John Silver's construction program into an enclave for union construction companies.

This Court, in an unbroken line of decisions, has struck down as *per se* unlawful, concerted refusals to deal strikingly similar to the arrangements in this case, but where the effects were far less destructive to competition than those spawned by Respondents' scheme. The lower Court's refusal to apply the *per se* rule here, therefore, marks a radical departure from the teachings of this Court.

This Court's failure to reverse the decision below would be tantamount to its sanctioning a substantial and alarming erosion of heretofore settled principles governing the *per se* rule. And, by so doing, the Sherman Act, "the Magna Carta of our free enterprise system,"[1] which has long stood sentinel over this nation's economic freedoms, would suffer a major setback.

1. The jury specifically found that Respondents entered an agreement, outside the labor exemption, that disqualified non-union companies from Long John Silver's contracts. The

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[1] United States v. Topco Associates, Inc., 405 U.S. 596, 612 (1972).

lower Court, although purporting to "apply traditional antitrust principles" to the agreement declined to evaluate it under the *per se* rule.

The lower Court's failure to apply the *per se* rule amounts to a fundamental repudiation of this Court's decisions. The litmus test for *per se* illegality has been repeatedly stated by this Court:

> "In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade . . . certain agreements or practices are so 'plainly anticompetitive' . . . and so often 'lack . . . any redeeming virtue' . . . that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases."

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 7-8 (1979); *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1 (1958); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

The Respondents' refusal to transact business with Muko and all other non-union construction companies is the archetypal example of such a practice. This is readily apparent by viewing the effect of the agreement's restraints on the ABC membership.

To begin with the restraints imposed by Respondents' agreement were pervasive and extended far beyond Petitioner Muko. Any and all non-union contractors were victims of the conspiracy. As the largest association of non-union construction companies, the ABC membership was the most seriously injured because all 17,000 ABC members were within the targeted class. [2]

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[2] ABC members belong to one or several of the 70 ABC local chapters as well as to the national association. The Western Pennsylvania Chapter of ABC, composed of over 100 member contractors who regularly perform construction work in the Pittsburgh area, including the construction of fast food restaurants and small commercial buildings, were the principal casualties of Respondents' boycott.

Secondly, the restraints were continuing and substantial. The Respondents' agreement to boycott all non-union companies was not confined to the single construction project at Burrell township. To the contrary, the exclusion applied to all future restaurants built by Long John Silver's in the Western Pennsylvania area which encompassed the construction of at least 19 restaurants as of the trial date. Indeed, the restraints remain in force today and apply, *in futuro*, to any Long John Silver's restaurant constructed in the geographic area.

It is obvious that Muko's exclusion from the construction of nineteen restaurants constitutes a substantial anticompetitive restraint. That restraint, however, is far more pernicious because it also affects all non-union construction companies. This includes the large numbers of ABC member companies which perform vast amounts of this type of construction and, in some cases, depend on it for their continued existence.

Thirdly, the restraints are absolute in nature. *All* non-union companies are indiscriminately excluded from *all* Long John Silver's construction.[3] If Respondents' agreement was to become commonplace and extend to other consumers of construction services furnished by ABC members, it would virtually destroy the ABC members' business and eliminate them as competitors.

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[3] The lower Court seems to imply that the restraint is not absolute because Muko could become eligible for Long John Silver's construction by becoming a union contractor. This basically misconceives the situation. Under federal labor laws, union representation is a matter exclusively reserved for the employees and not the contractor. *See*, 29 U.S.C. § 157. It is well settled that an employer violates the law by interfering with its employees' right to select or reject union representation. *See, e.g.*, International Ladies' Garment Workers Union v. NLRB, 366 U.S. 731 (1961). Accordingly, Muko was powerless to become a union contractor because that decision was committed to its employees. Indeed, had Muko followed the lower Court's suggestion, it undoubtedly would have violated the nation's labor laws.

The pervasive, continuing and absolute characteristics of the restraints remove any doubt as to the "plainly anticompetitive" nature of Respondents' agreement. It is equally clear that this Court's second prerequisite for *per se* illegality — the agreement's lack of any redeeming virtue — is also satisfied.

Indeed, there can be no question on this point because the proceedings below were barren of any suggestion, let alone proof, that the Respondents' arrangement would produce a single pro-competitive effect on the commercial construction market. This absence stands in stark contrast to the devastating anticompetitive impact Respondents' boycott has for all non-union contractors including the ABC membership.

Perhaps cognizant of the paucity of pro-competitive consequences flowing from Respondents' agreement, the lower Court lamely suggested that the agreement encouraged competition because it enabled Long John Silver's to gain "a position in the Pittsburgh area fast food market." That unsupported claim, even if valid, is of no significance.[4] Since the restraints affected the construction market, it is that market which must evidence pro-competitive effects to avoid application of the *per se* rule. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). The decisions of this Court have repeatedly rejected the notion that the appearance of pro-competitive effects in one sector of the economy offsets the economic damage wrought by anticompetitive restraints in another. See, e.g. *Catalano, Inc. v. Target Sales, Inc., supra*, 446 U.S. 643; *United States v. Topco Associates, Inc., supra*, 405 U.S. at 610.

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[4] The Respondents' agreement, of course, had nothing to do with Long John Silver's success in the Pittsburgh fast food market. The entry and success of Long John Silver's in that market was attributable to a host of competitive factors such as pricing, product, locations, etc. It bore no relation to whether the restaurants were constructed with union or non-union labor.

Because the decision below is so clearly contrary to the controlling decisions of this Court governing use of the *per se* rule, it is vital that this Court exercise its discretion to review and reverse the lower Court.

2. The lower Court's departure from this Court's decisions on *per se* illegality is that much more egregious because it ignores decisions where arrangements virtually indistinguishable from Respondents' scheme have been condemned as illegal under the antitrust laws. Accordingly, unless this Court acts to reverse the decision below, the continued viability of the principles articulated in those earlier cases will be critically impaired.

In *Connell Const. Co., Inc. v. Plumbers & Steam. Local Union No. 100*, 421 U.S. 616 (1975) a union and a general contractor agreed to boycott non-union construction companies by excluding them from consideration for subcontracts from the general contractor. Although this Court confined its inquiry to the narrow issue of whether the agreement was exempt from federal antitrust laws, it condemned the arrangement as contravening federal antitrust policies in terms reserved for practices adjudged to be *per se* illegal:

> "Here Local 100 by agreement with several contractors, made non-union subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625.

Similarly, in *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945) this Court scrutinized agreements between a union, contractors, and electrical manufacturers to cease dealing with companies that did not employ the union's members. Finding that the union's participation did not immunize the conspiracy from antitrust liability, the Court concluded, with-

out a rule of reason analysis, that the agreement violated the Sherman Act.

The Respondents' agreement is of the same character. Non-unionized construction companies, such as those comprising the ABC membership, have been made ineligible to compete for any of Long John Silver's construction work. Their exclusion is predicated not on any pro-competitive virtues, but rests solely on Respondents' intention to monopolize the market for union construction. Just as this Court unhesitatingly condemned such restraints in *Allen Bradley* and *Connell*, it must similarly act in this case.

Apart from those cases, this Court has repeatedly adjudged as *per se* illegal the generic classification of boycotts or refusals to deal, irrespective of their particular form. See *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (agreement among manufacturer, distributors and retailer to boycott competing retailer); *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966) (agreement between manufacturer and dealers to eliminate discounters from access to the market is *per se* unlawful); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (concerted refusal to sell gas for use in plaintiff's gas burner); *Fashion Originators' Guild v. Federal Trade Com'n*, 312 U.S. 457 (1941).

In short, this Court has had considerable experience with a class of restraints that not only includes arrangements indiscernible from Respondents', but encompasses vastly broader and more diverse commercial practices. All of this conduct has been found to be manifestly anticompetitive and adjudged to be subject to the *per se* rule. The error of the Court below lies in its failure to follow the correct and established standards of these cases for adjudging such practices as *per se* illegal and, therefore, requires this Court's review and correction.

3. It is also imperative that the Court review the decision below to resolve important and recurring questions of antitrust law. This is particularly crucial in this case where the Court of Appeals, asserting the existence of a "continuing controversy over the definition of the *per se* illegal boycott," premised its decision on the erroneous belief that this Court's decisions mandated the result reached below. (Pet. Cert. App. p. 17a).

The Court of Appeals ruled that insofar as group boycotts were concerned, the *per se* rule was confined to horizontal boycotts where competitors seek to exclude other competitors from the marketplace while the rule of reason applied to all other boycotts. The Court found that this Court "intimated" acceptance of this boycott dichotomy in *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 542 (1978) and discerned further endorsement by this Court from its "survey of the [Supreme] Court's group boycott decisions." (Pet. Cert. App. p. 16a-17a).

The lower Court's analysis is fundamentally flawed. It is true that in *St. Paul Fire & Marine Insurance Co.* v. *Barry*, *supra*, this Court expressly left open the issue of whether the boycott there was *per se* unreasonable. *Id.* at 542. However, the Court's opinion does not remotely suggest that the *per se* rule is confined to combinations which target only competitors of the boycotters. To the contrary, the Court reaffirmed in that case that it is the nature of the restraint, not the identity of the conspirators, which determines whether the *per se* rule or the rule of reason applies, and it broadly hinted that the *per se* rule applied to a wide range of boycotts. [5] Moreover, a survey of this

[5] The challenged practices in St. Paul Fire & Marine Ins. v. Barry, *supra* involved an agreement among insurance companies to refuse to deal with each others customers. Although it was unnecessary to pass on whether the restraint was *per se* unlawful, the Court described the arrangement's illegality under the antitrust laws in terms of, and by citation to, authority involving *per se* illegality. *Id.* at 543-545.

Court's decisions yields nothing but a uniform policy of adjudging such restraints under the *per se* rule. See *supra*, p. 7.[6]

The exclusion of non-union contractors from construction work under arrangements similar to the agreement challenged in this case, is a recurring phenomenon. For example, during 1981 ABC received frequent reports from its membership of instances where users of construction services informed an ABC contractor that it was ineligible to bid on or perform a construction project because of its non-union status.[7]

Because the issue of the correct application of the *per se* rule to such arrangements is recurring, it involves important antitrust principles and, most importantly, because the lower Court believed there is "continuing controversy" over this issue and has erroneously characterized this Court's decisions as requiring the result reached below, it is essential that this Court decide the matter and settle the confusion engendered by the Court of Appeals' decision.

4. It is vitally important to the ABC membership that the confusion generated by the Court of Appeals be resolved by this Court. Application of the *per se* rule to such plainly anticompetitive boycotts is requisite to the elimination of such practices and the preservation of competition in the construction markets. An ABC member victimized by these boycotts

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[6] Indeed, this Court expressly observed in St. Paul Fire & Marine Ins. Co. v. Barry, *supra*, that

> ". . . the boycotters and the ultimate target need not be in a competitive relationship with each other. This Court has also held unlawful concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers." (Citing cases of group boycotts held to be *per se* unlawful.) *Id.* at 543.

[7] Since ABC represents only a portion of the open shop contractors in the United States, and since not all refusals to deal are reported to ABC, these reports represent only the tip of the iceberg.

typically has neither the time nor the resources to engage in protracted and expensive antitrust litigation that invariably follows where restraints are analyzed under the rule of reason. The prospect of an incredibly complicated and prolonged judicial procedure, undoubtedly will deter small contractors and businessmen from pursuing their legal rights. Such a result obviously is in basic disharmony with the purposes underlying the Sherman Act.

Furthermore, as this Court has explained, use of the *per se* rule encourages compliance with the law by aiding businessmen to predict whether their arrangements will be deemed legal or illegal by the courts. *United States* v. *Topco Associates, Inc.*, *supra*, 405 U.S. at 609-610.

Finally, it is important for this Court to review and resolve the instant matter because the challenged practices are continuing and of nationwide scope. For example, Long John Sliver's is a national restaurant chain. It is extremely unlikely that its participation in the challenged boycott will be confined to the Western Pennsylvania area. Rather, the success of the boycott and the lower Court's decision herald the spread of such arrangements throughout the nation.[8]

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[8] A glimpse of the magnitude of the potential market affected by these boycotts may be gleaned from a recent report issued by the United States Department of Commerce. In the area of franchised restaurants, which encompasses establishments similar to Respondent, Long John Silver's, the Department of Commerce estimates that there are over 69,000 restaurants throughout the United States. This represents an increase of 10,000 restaurants over the comparable 1980 statistics. U.S. Department of Commerce, Bureau of Industrial Economics, *Franchising in the Economy 1980-1982*, January, 1982 at pp. 66-67.

It is the construction of these restaurants, as well as all other commercial, industrial and residential buildings, that are vulnerable to boycotts akin to that challenged in this case.

CONCLUSION

For the reasons stated herein, as well as those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APR 29 1982

No. 81-1798

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OCTOBER TERM, 1981

LARRY V. MUKO, INC.

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SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, LONG JOHN SILVER'S INC. AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PITTSBURGH, PENNSYLVANIA, AND VICINITY,

Respondents.

ON WRIT OF CERTIGRARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION OF LARRY V. MUKO, INC.

Center on National Labor Policy hereby respectfully moves pursuant to this Court's Rule 36 for leave to file its brief *amicus curiae* in support of the petition of Larry V. Muko, Inc. Consent was sought from all parties and received

from Petitioner and denied by Respondents Long John Silver's and Southwest and Pittsburgh Building Trades Councils. All these documents have been filed with the Clerk.

The accompanying brief urges this Court to reverse the holding of the United States Court of Appeals in *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council, et. al.*, 670 F.2d 421 (3d Cir. 1982).

The Center On National Labor Policy is a national nonprofit, nonpartisan organization, chartered as a public-interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers. Private pressure groups, such as organized labor groups, have a history of significant impact on the rights of the public, consumers, taxpayers, and workers. As this Court recognized in *Connell Const. Co. v. Plumbers and Steamfitters, Local No. 100,* 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers. . . ."

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of pressure groups such as labor unions.

The Center on National Labor Policy can bring to this case a diverse perspective not presently represented. Therefore, the Center's participation can assist the Court in obtaining full consideration of the public-interest issues.

Accordingly, the Center on National Labor Policy respectfully requests leave to file the annexed brief *amicus*

curiae in support of Petitioner *Larry V. Muko, Inc.'s* petition for certiorari.

Respectfully submitted,

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INTEREST OF AMICUS

The Center on National Labor Policy is a national non-profit, non-partisan organization chartered as a public interest legal foundation to engage in national litigation in

matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers and workers.

The decision of the Court of Appeals has created a need for this Court to determine the perimeters of §8(e) of the National Labor Relations Act, 29 U.S.C. §158(e). The Court must provide guidance in determining the criteria to be used in applying the "per se" standard of antitrust liability. Moreover, because the Court of Appeals ignored its own precedents in this area, *Consolidated Express Inc. v. New York Shipping Assoc.*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980), it created a conflict with the Sixth Circuit's decision in *South-East Coal Co. v. Consolidated Coal Co.*, 434 F.2d 767 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971), as well as a conflict with the Ninth Circuit in *California State Council of Carpenters v. Associated General Contractors of California, Inc.*, 648 F.2d 527 (9th Cir. 1980), *cert. granted*, 49 U.S. L.W. 3528 (No. 81-334, Jan. 11, 1982).

Accordingly, the Center, as a public interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens should be paramount to the collective privileges of pressure groups such as labor unions. Where the individual constitutional rights of workers are sacrificed to these pressure groups, the public interest is substantial. Consequently, the Center's concerns about their impact are significant.

Further background and interests of amicus have been detailed in the preceeding motion to file this brief.

STATEMENT OF THE ISSUE

Whether the "per se" standard of review is to be employed in determining the antitrust liability of a bilateral agreement between union officials and businessmen that falls outside the non-statutory "labor" exemption.

INTRODUCTION

Larry V. Muko, Inc. ("Muko") is a non-union general contractor. Muko is experienced in the construction of fast food restaurants generally, and Long John Silver's ("Silver") restaurants specifically. Silver's employees do not construct the restaurants — Silver contracts out for these services.

Southwestern Pennsylvania Building and Construction Trades Council, and Building and Construction Trades Council of Pittsburgh, Pennsylvania, and Vicinity ("Unions") are labor organizations as defined by the National Labor Relations Act, 29 U.S.C. §152(5). They represent unions whose members perform construction in Allegheny County and vicinity. The unions do not represent Silver's or Muko's respective employees. In fact, the unions have no intention, nor did they ever attempt to organize and represent Silver's employees.

At the grand opening of Silver's first restaurant, the unions began handbilling in an attempt to notify the public that this restaurant was built by a non-union contractor. The unions handbilling lasted for 2-3 days.

After the cessation of the handbilling, Silver and Muko executed a contract whereby Muko would construct another Silver's restaurant in the Pittsburgh area. Prior to the

execution of this contract, Silver's President told Muko that he could construct all Silver's restaurants in Western Pennsylvania if Muko continued its high quality work and competitive prices.

Silver, however, because of its concerns of renewed handbilling by the unions at its second Muko constructed restaurant, had a meeting with the union officials on November 1, 1973. At this meeting, union officials took the position that all restaurants must be built exclusively with union labor, regardless of wages and working conditions of non-union contractors. In addition, Silver's President was given a list of approved union contractors.

The November 1, 1973 meeting consummated an agreement between Silver and the union officials. The net effect of this agreement was that in return for the unions refraining from informational picketing and leafletting at Muko constructed restaurants (the only Silvers restaurants in the area), Silvers would use only contractors with whom local unions had collective-bargaining agreements, namely, union contractors. This agreement was subsequently reduced to writing on November 7, 1973. Prior to this agreement, Silver's policy was to award construction contracts on a nondiscriminatory basis.

As a consequence of the November agreement, Silver asked Muko if it would build as a union contractor. Muko refused to do so. Muko was then told not to bid on any future Silver construction projects. All subsequent construction of Silver's restaurants was done exclusively by union contractors who had collective-bargaining agreements with the unions and who were generally not able to build restaurants as quickly or as economically as Muko. The additional cost of employing union labor to construct ten restaurants for Silver, pursuant to this written agreement, was approximately $225,000.

At the conclusion of the trial on liability, the district court submitted four Special Interrogatories to the jury. (Pet. 6-7). The jury specifically found, in response to Special Interrogatory #1, that the defendants entered "into an agreement or combination to refuse to grant construction contracts to non-union builders, including Muko." (Pet. 6).

Moreover, in response to Special Interrogatory #2, the jury determined that the effect of defendants agreement was "to impose a restraint on free competition beyond that which would follow from the elimination of competition based on wage rates and working conditions." (Pet. 6).

Finally, responding to Special Interrogatory #3, the jury held that the restraint of trade which it found existed in Special Interrogatories #'s 1 and 2 was not unreasonable. (Pet. 6-7).

On appeal, the Third Circuit by 2-1 vote, held that labor-management agreements to restrain competition falling outside the protection of the National Labor Relations Act requires a second determination that the agreement was unreasonable. *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council, et al.*, 670 F.2d 421 (3d Cir. 1982).

ARGUMENT

I.

THE NONSTATUTORY EXEMPTION FROM ANTITRUST LIABILITY FOR UNIONS IS NOT APPLICABLE IN THIS CASE

A. The Court of Appeals Failed to Apply The Facts And Holding Of This Court's Decision In Connell

Union activity to restrain competition in the marketplace that otherwise would be a violation of the federal antitrust laws, has been held "protected activity" and exempt from antitrust liability based upon one of two theories. First, there exists a statutory exemption which permits workers to combine together for self help and other activities concerning their wages and conditions of employment. Clayton Act, §§6 and 20, 15 U.S.C. §17, 29 U.S.C. §52 (1914). These sections provide that conduct made non-enjoinable by the Clayton and Norris-LaGuardia Acts cannot be held to violate any federal law.

Exemplary of these particular statutory exemptions are the construction industry and garment industry exemptions provided for by §8(e) of the National Labor Relations Act, 29 U.S.C. §158(e). The construction industry proviso permits voluntary "prehire" agreements to be reached between unions and employers. However, it is not as broad as the garment industry exemption which explicitly permits the union to negotiate agreements to exclude market competitors. These so-called "Hazentown agreements," which "are by definition between union and non-labor parties," and which would otherwise violate federal antitrust laws because of that combination, are specifically protected by the federal labor laws. There is no similar saving clause for a concerted-bilateral "Hazentown Agreement" in the construction industry that could save the Silver-Union agreement in this case. *See: Jou-Jou Designs, Inc. v. International Ladies Garment Workers Union,* 643 F.2d 905 (2d Cir. 1981).

Second, a non-statutory exemption was created by the Court to provide and allow for a balancing of interests between the antitrust laws and the federal labor laws. *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616, 622 (1975) ["Connell"]. In essence, this exemption tests the restraints on commerce which arise out of the collective-bargaining relationship with an accommodation of the latter interest. The extent of this non-statutory exemption is the heart of this case.

The decision of the Third Circuit reflects the confusion regarding the perimeters of the non-statutory exemption. The majority and dissenting opinions are in agreement not only regarding the controlling precedents, but also the conclusions based upon those precedents. The Third Circuit disagreed however, upon which antitrust standard to apply, *viz.*, the "per se" rule or the "rule of reason."

Amicus is in agreement that *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975), *Consolidated Express, Inc. v. New York Shipping Association Inc.,* 602 F.2d 494 (3d Cir. 1979), *vacated and remanded on other grounds,* 448 U.S. 902 (1980), and *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council,* 609 F.2d 1368 (3d Cir. 1979) ["MUKO I"], control and stand for the proposition "that once it is ascertained that union activity falls outside the protection of the labor exemption, a court must apply traditional antitrust principles in determining whether the activity in question violates the antitrust laws." *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council,* 670 F.2d 421, 434 (3d Cir. 1982) ["MUKO II"] (Sloviter, J. dissenting).

The jury, in response to the Four Special Interrogatories submitted to it by the district court, explicitly "found that the

defendants had reached an agreement outside the labor exemption to exclude Muko as a competitor for Silver's construction work." (Pet. 5a-6a). This Court has held that an agreement limiting a general contractor to contracting with firms that are parties to an agreement with a union removes the union's antitrust immunity. *Connell* at 624, 635.

Therefore, the appropriateness of these instructions as they relate to the applicable standard of review must be weighed in light of the precedents all parties agree are controlling.

The *Connell* case, presented this court with a factual setting favorably paralleling the facts in the present case. In *Connell,* the union sought to have all work subcontracted out by general contractors to firms that had current collective-bargaining agreements with the union. In the instant case, the union officials sought to similarly exclude all non-union contractors from contracting with Silver for construction of its restaurants. As in *Connell,* the union in this case had no interest in representing the general contractor's employees.

Local 100, in *Connell,* by securing agreements with general contractors to exclude non-union subcontractors from the market, applied a direct restraint on the business market and therefore the union's non-statutory exemption from the antitrust laws was pierced. In the case at bar, union officials were specifically found to have agreed with Silver to exclude non-union contractors from the market, thereby applying a direct restraint on the market. *See: United States v. Women's Sportswear Mfg. Ass'n,* 336 U.S. 460, 464 (1949) (collective bargaining agreement limiting work to union shops which were members of a trade association violated §1 of the Sherman Act).

The parallels between *Connell* and this cause continue — the jury in *Muko II* determined that not only were non-union firms as a class excluded, but also that Muko was specifically excluded. As in *Connell,* the union gained complete control of the market. "Such control could result in significant adverse effects on the market and on consumers — effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." *Connell,* 421 U.S. at 624. An arguably reasonable restraint becomes *ipso facto* unreasonable when it is accompanied with a specific intent to accomplish a result which is otherwise forbidden by law. *United States v. Columbia Steel Co.,* 334 U.S. 495 (1948).

This court also held in *Connell,* that because the agreement was outside the collective-bargaining relationship and because it was not restricted to a particular jobsite, the union could not shield itself from a federal antitrust lawsuit. Thus, a union looses its antitrust exemptions when it obtains an exclusionary agreement which does nothing to further federal labor policy. *South East Coal Co. v. Consolidation Coal Co.,* 434 F.2d 767, 775 (6th Cir. 1970). *See: Allen Bradley Co. v. Local Union No. 3,* 325 U.S. 797 (1945).

Similarly, in *Muko II* the restraint did not apply to a particular jobsite, but rather it applied to all Silver jobsites in and around the Pittsburgh and Allegheny county areas. Thus, an exclusionary agreement was reached in this case which did nothing to further federal labor policy in any manner.

The parallels between *Muko I & II* and *Connell* are significant. The relevant facts in *Connell* are mirror images of the facts presented to the court in the present case and therefore, the results should be the same.

B. Once The Determination Is Made That Labor's NonStatutory Exemption Is Inapplicable, The District Court Should Apply the "Per Se" Rule Of Antitrust Liability

There are two distinct theories under which antitrust liability will attach. The first theory of liability is the "rule of reason". Under this analysis "only unreasonable restraints of trade are forbidden," even though the Sherman Act makes "every . . . conspiracy, in restraint of trade or commerce," unlawful. *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127 (3d Cir. 1978). An "unreasonable restraint of trade" has been defined as a restraint of trade which does not merely regulate and possibly promote competition, but rather is a restraint which suppresses or possibly destroys competition. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918).

The second theory of antitrust liability is the "per se" mode of analysis. This theory holds that "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railroad v. United States*, 356 U.S. 1, 5 (1958).

Certain classes of restraints which by their very nature are unduly restrictive and hence forbidden by common law and statute have been held illegal "per se". *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

These illegal "per se" practices include: *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (resale price maintenance); *Klor's Inc.*

v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959) (group boycott); *International Salt Co. v. United States*, 332 U.S. 392 (1947) (tying arrangements); *United States v. Griffith*, 334 U.S. 100 (1948) (certain types of reciprocal dealing) and *Cernuto, Inc. v. United States Cabinet Corporation*, 595 F.2d 164 (3d Cir. 1979) (deliberate withdrawal of product from distributor by manufacturer at request of distributor's competitor); *Aurora Enterprises, Inc. v. National Broadcasting Co.*, 524 F. Supp. 655 (C.D. Ca. 1981) ("block-booking" of television shows).

Thus, federal courts have condemned as illegal "per se" activities categorized in the following general areas:

1) combinations of traders at one level of distribution with the purpose of excluding direct competition from the marketplace — *"horizontal combinations"* — *Catalano, Inc. v. Target Sales*, 100 S.Ct. 1925 (1980), *Associated Press v. United States*, 326 U.S. 1 (1945); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600 (1914);
2) combinations whose purpose it is to exclude certain direct competitors of some member of the conspiracy — *"vertical combinations"* — *Klor's, Inc. v. Broadway — Hale Stores, Inc.*, 359 U.S. 207 (1959), *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), and
3) certain combinations whose purpose it is to influence the trade practices of its victims by coercion — *"coercive combinations"* — *Kiefer-Stewart Co. V. Joseph E. Seagrams & Sons, Inc.*, 340 U.S. 211 (1951); *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941).

In *Klor's Inc.*, 359 U.S. at 212, this court held that vertical combinations could not be "saved by allegations

that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *See: Fashion Originators' Guild v. Federal Trade Commission,* 312 U.S. at 466. For the same reason, the vertical agreement between Silver and the unions in the present case cannot be saved.

As the Court recently stated in *Catalano, Inc. v. Target Sales,* 100 S.Ct. 1925, 1928 (1980):

> In any event, when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful "per se."

In a labor context, "[o]nce a court has concluded that the labor exemption does not shield anticompetitive conduct, application of the rule of reason is redundant." *Consolidated Express, Inc. v. New York Shipping Association,* 602 F.2d 494, 523 (3d Cir. 1979) ["Conex"].

Therefore, if the court determines that a "per se" violation is established, then "the court will already have found that 'the nature and necessary effect' of the challenged conduct is 'plainly anticompetitive.' " *Conex,* 602 F.2d at 523, *citing with approval, National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978). Once the activities are found to be plainly anticompetitive, then under the "per se" illegality theory it need only be shown that the defendants in fact engaged in that activity. *United States v. United States Gypsum Co.,* 438 U.S. 422, 442 (1978).

In *Muko,* the jury was afforded two opportunities to go to the well and exonerate Silver's and the unions' activities. In Special Interrogatory #2 the jury determined that the labor

exemption did not apply because the respondents activities were such as "to impose a restraint on free competition beyond that which would follow from the elimination of competition based on wage rates and working conditions..." and in Special Interrogatory #3 the jury was asked if this non-exempt activity was "an unreasonable restraint of trade?"

The effect of these interrogatories was to permit the jury to find a restraint of trade based on union versus non-union status, to find a restraint of trade based on factors other than wages and conditions of employment, and yet find that these restraints were reasonable pursuits by labor union officials.

Applying the *Conex* redundancy principal, these interrogatories were indeed repetitious because the jury had found a "per se" violation, and, therefore the Special Interrogatory questioning the reasonableness of respondents conduct was superfluous. The District Court and the Court of Appeals panel fully ignored the precedents established by this Court and the Third Circuit itself and permitted what can only be called "double dipping." More appalling is the fact that these courts have created an additional unfounded burden to finding antitrust liability against unions.

An agreement which by its very nature tends to create a closed shop in violation §8(a) of the National Labor Relations Act, is as well a "per se" violation of federal antitrust laws. The federal courts have almost 50 years of experience in applying federal labor law to specific fact situations. The courts are fully capable of determining when union conduct is unprotected activity subject to antitrust scrutiny. This is not an area where the courts lack expertise. To permit agreements, such as exhibited by Muko and Silver, to stand and be actively supported and enforced does not serve the public interest. Rather, it works against the interests of workers, employers and even unions.

The unpredictability attendant to the exercise of judicial discretion in choosing the standard to apply in each case is obvious and unmanagable for the jury as this case demonstrates. The broad discretion thus permitted creates a standardless decisionmaking process. Only a "per se" liability standard will have sufficient certainty to persuade labor union officials to forego boycotts and other forms of market restraints.

II.

THE COURT OF APPEALS HAS PERMITTED AN UNWARRANTED INCURSION INTO THE PROTECTED RIGHTS OF WORKERS

A. Workers Rights Have Not Been Vindicated By The MUKO II Decision

One serious aspect of the present case overlooked by the courts below, has been the issue of the rights of Muko's employees. Subsequent to the November 1, 1973 meeting and agreement between Silver and the union officials, Silver informed Muko that only if he became a union contractor, could he continue to receive further construction jobs from Silver.

Muko refused the offer from Silver and was subsequently told not to make any further bids on Silver construction projects. On the other hand, had Muko agreed to Silver's offer, he would have infringed the Section 7 rights of his employees and would have been guilty of unfair labor practices under §8(a)(2) and (a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a) (2), (a) (3).

Section 7 of the NLRA guarantees all workers the freedom of choice to determine whether he or she wishes to

join or refrain from joining or assisting a labor union. *NLRB v. Savair Manufacturing Company,* 414 U.S. 270, 278 (1973). "[R]ejection of a union is a concomitant right of equal rank and dignity with the right to select a union." *NLRB v. S.S. Logan Packing Co.,* 368 F.2d 562 (4th Cir. 1967). It is the freedom of choice of the employees to choose whether or not to be represented by a labor organization that is protected, not the employer's right to choose it for them and most certainly not the right of union officials.

Moreover, as this court recognized in *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad,* 353 U.S. 30, 40 (1957), the nonstatutory exemption was designed primarily to protect workers, not labor unions or employers. Yet it was pursuant to this nonstatutory exemption that the lower courts infringed upon, and effectively destroyed the associational rights of workers. The Congressional purpose is to protect the rights of individual employees in their relations with labor organizations, 29 U.S.C. §141, not the right of unions to exist even when they enjoy no majority status. Cong. Rec., App. 1776 (Aug. 3, 1959), *citing with approval, Curtis Brothers,* 119 N.L.R.B. No. 33 (1959).

B. Contrary to the Public Interest, The Court of Appeals Has Implicitly Sanctioned Anti-competitive Labor Markets

Petitioner recognized that which Silver and the union officials elected to disregard, *viz.,* the First Amendment and Section 7 rights of his employees. Because of Muko's recognition of employee rights, he was prohibited from further bidding on Silver contracts. Thus, not only did Muko lose, but so too did Muko's employees and society. The

workers lost jobs and society lost lower productive prices which are otherwise guaranteed and protected by the principle of competition embodied in the Antitrust laws. *Stifel Nicolaus & Co. v. Dain, Kalman & Quail,* 578 F.2d 1256 (8th Cir. 1978).

In so acting, the union officials did not improve the wages and working conditions of the construction workers. Rather, their power play merely increased their dues-paying constituency. Because that end, however legal, is not sanctioned by the exemption, *Connell,* 421 U.S. at 625, their actions run contrary to the public interest. In the instant case, the public has a legitimate interest in promoting a construction market unhampered by anticompetitive activities of individuals, labor or nonlabor. The private interest of the union officials is in organizing workers via anticompetitive and monopolistic means. Because such tactics, as discussed *supra,* are not privileged under the law, the public interest, as protected by the antitrust laws, prevails in this case.

Thus, the Court of Appeals ignored the rights of workers and created an unwarranted exception to the freedom of association embodied in the First Amendment by abandoning the "per se" standard of liability applicable to union-employer conspiracies unprotected by federal labor law.

CONCLUSION

The District Court and the Court of Appeals have misconstrued the appropriate standard of review which is mandated on the facts as presented. These courts have created an extra-special exemption by which unions may avoid antitrust liability. The creation of this new exemption tends to make a nullity of not only the federal antitrust laws

and federal labor laws but more importantly impinges upon the First Amendment Freedom of Association. For these reasons, the Center on National Labor Policy respectfully requests that this Court grant the Petition for Writ of Certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted,

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No. 81-1798

In the Supreme Court of the United States

OCTOBER TERM, 1982

LARRY V. MUKO, INC., PETITIONER

v.

SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an agreement between a labor union and a firm wherein the firm agrees, contrary to Section 8(e) of the National Labor Relations Act, to use only union-signatory contractors for its construction work, constitutes a per se violation of the antitrust laws.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 670 F.2d 421. The district court's order denying a new trial (Pet. App. 43a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 39a-40a) was entered on January 25, 1982. A petition for rehearing was denied (Pet. App. 41a) on February 17, 1982. The petition for a writ of certiorari was filed on March 26, 1982. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, is set forth at Pet. 2. Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. 158(e), is set forth at Pet. 2-3.

STATEMENT

1. Respondent Long John Silver's, Inc., (Silver's) is a fast food restaurant chain. It hired petitioner Larry V. Muko, Inc. (Muko), a non-union general contractor, to build its first two restaurants in the Pittsburgh area (Pet. App. 2a-3a). The Southwestern Pennsylvania Building and Construction Trades Council and the Building and Construction Trades Council of Pittsburgh, Pennsylvania (Trades Councils) picketed the site of the first restaurant during construction.[1] Following completion of the building, the Trades Councils distributed handbills to customers advising them that Silver's used "'contractors who are paying less than the established prevailing wages in the area'" and urging them "'to protect the living and working standards established by the Building Trades Council'" (*id.* at 3a). Alarmed that the company was losing customers as a result of the handbill distribution, Silver's vice-president met with Trades Council officials (*ibid.*). Thereafter he sent them a letter declining to sign a collective bargaining contract but stating (*id.* at 45a-46a):

> I believe that we can serve the same purpose with this letter to show intent that Long John Silver's, Inc., plans to use only union contractors certified by the affiliated Building and Construction Trades Councils of Pittsburgh * * * and vicinity. We will also request that all the investors (property owners) developing for us use union contractors. * * * As soon as we have firm bids on several construction sites, we will contact you to be sure that these contractors are in good standing with the union.
>
> In any relationship between two parties there must be mutual need and assistance. * * * It is also extremely important to both parties that our location at

[1] There is no collective bargaining relationship between respondent Trades Councils and Silver's or Muko.

Monroeville, Pennsylvania and the one under construction in Lower Burrell Township, Pennsylvania not be subjected to any kind of informational picketing.

Muko subsequently refused to work as a union contractor, and was therefore not awarded any of Silver's contracts after construction of the second restaurant (Pet. App. 4a). Muko had previously been told that as long as its prices were competitive, it could have all of Silver's work in the area (*id.* at 3a).

2. On August 12, 1975, Muko filed suit against Silver's and the Trades Councils in the United States District Court for the Western District of Pennsylvania, alleging that they had entered into an unlawful agreement to award construction contracts only to union contractors (Pet. App. 4a). At the first trial of this case, the district court directed a verdict for Silver's and the Trades Councils for want of an agreement between them. The court concluded that the evidence disclosed nothing more than a unilateral decision by Silver's to use union contractors. This decision was reversed by the court of appeals en banc. *Larry V. Muko, Inc.* v. *Southwestern Pennsylvania Building & Construction Trades Council*, 609 F.2d 1368, 1372 (3d Cir. 1979) (*Muko I*). The court of appeals also found that Muko had presented enough evidence to allow the jury to conclude that the challenged conduct was not protected from antitrust liability by the labor exemption (609 F.2d at 1372-1375), but pretermitted a decision on whether antitrust liability, if any, should be determined by a per se or rule of reason analysis (609 F.2d at 1376).

On retrial, the jury returned a verdict for Silver's and the Trades Councils, finding in response to special interrogatories that: (1) they did "enter into an agreement or combination to refuse to grant construction contracts to non-union builders, including Muko" (Pet. App. 5a), and (2) the effect of the agreement was "to impose a restraint on free competition beyond that which would follow from the elimination of competition based on wage rates and working conditions" (*ibid.*), but (3), under a rule of reason charge, the agreement was not an unreasonable restraint on trade (*id.* at 5a-6a; see also Pet. 6-7).

3. On appeal, Muko argued that the district court should have held the agreement illegal per se, rather than allowing the jury to analyze the evidence under a rule of reason charge. Muko asserted that labor-related conduct sufficiently anticompetitive to fall outside the labor exemption should be deemed a per se antitrust violation because such conduct is by definition unreasonable. The court of appeals, by a 2-1 vote, rejected these arguments. The court held that once a labor-related agreement was found not to be exempt from antitrust liability, "conventional" antitrust principles should be applied, rather than an automatic per se rule or rule of reason analysis (Pet. App. 7a-12a). After examining the record, the court concluded that the legality of the challenged restraint in this case was properly ascertained pursuant to a rule of reason analysis rather than a rule of per se illegality (*id.* at 21a-23a).

In rejecting the per se approach, the majority noted that the case did not present a "classic" group boycott because it did not present one group of business competitors attempting to exclude horizontal competitors from the marketplace (Pet. App. 14a-17a). Instead, it found that (*id.* at 21a):

> [s]imply put, a small retailer has been picketed by a union. To preserve its business, the firm agrees to purchase union-made goods or services in the future. We cannot agree * * * that this is the kind of behavior against which the *per se* rule traditionally has been invoked.

Moreover, the court found no competitive relationship between Muko and the defendants, nor an anticompetitive purpose behind the agreement: the Trade Council's only goal "was to ensure payment of the prevailing union wage" (*ibid.*). The restraint was limited to "only one relatively small buyer" (*id.* at 22a). No "significant" anticompetitive effects were shown—Muko continued to prosper despite losing Silver's business and could have regained it by entering into a contract with the union—and "procompetitive effects were demonstrated—Silver's gained a position in the otherwise crowded Pittsburgh-area fast food market" (*ibid.*).[2]

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[2] The court also rejected Muko's argument that the district court erred in charging the jury that it could find a relevant product market composed of "construction of small commercial buildings" rather than a narrower

Judge Sloviter dissented. She agreed that conventional antitrust principles applied to non-exempt union agreements, but argued that those principles required application of a per se standard in this case (Pet. App. 26a-27a). She found no warrant in precedent for distinguishing between horizontal and vertical boycotts (*id.* at 28a-29a), and noted in any event a horizontal competitive relationship between union and non-union labor, with Muko "representative" of the latter (*id.* at 29a-30a). Judge Sloviter further reasoned that if an agreement has an anticompetitive impact not warranted by labor policy, it cannot be saved from illegality by the absence of anti-competitive intent (*id.* at 30a-31a). Distinguishing the professional sports cases, she noted that Congress already has determined in passing Section 8(e) of the National Labor Relations Act that the agreement here lacks redeeming value (*id.* at 32a-33a). The majority's finding that the agreement affected only a limited portion of the market, she argued, was both wrong and irrelevant (*id.* at 33a-35a). Similarly, she reasoned that one purpose of the per se rule is to avoid the necessity for showing an anticompetitive effect in each case, as long as an agreement on its face has an "inevitably exclusionary" effect (*id.* at 35a-36a). Finally, she argued that the pro-competitive effect the majority found in the fast-food market had not been proven, and that even if it had, a pro-competitive effect in one market is not a justification for an anticompetitive effect in another (*id.* at 36a-37a). Thus, she concluded, "the underlying rationale for the majority's approach must stem from its discomfort with the application of traditional antitrust rules in the labor context" (*id.* at 37a).

DISCUSSION

The issue raised by Muko does not warrant review by this Court because it arises in a factual context that is unlikely to recur with great frequency due to a significant clarification of the law subsequent to the events that engendered

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market limited solely to the construction of fast food restaurants (Pet. App. 23a-26a). Petitioners do not raise this issue in their petition for certiorari.

this litigation. In any event, the result reached by the court of appeals is correct, and does not conflict with the decisions of this Court or any other circuit.

1. The incidents giving rise to this case took place in 1973. Subsequently, in *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 626-633 (1975), this Court held that agreements such as the one at issue here, between a union and an employer which do not have a collective bargaining relationship, whereby the employer agrees to use only union contractors or subcontractors, violate Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e).[3] In light of that decision, it seems unlikely that unions will often seek such agreements in the future, or that affected firms will lack a prompt remedy for them under the labor laws.[4] In this context, a ruling by this Court on the legality of such agreements under the antitrust laws is not essential. The underlying issue of antitrust law would be better addressed in a factual context of continuing practical significance.

2. Muko argues that the agreement here at issue should be held to be a per se violation of the Sherman Act because it violates Section 8(e) of the NLRA and, alternatively, because it meets the conventional standards for a per se antitrust violation. Neither argument is correct.

a. The court of appeals unanimously rejected Muko's contention that an agreement that violates Section 8(e) of the National Labor Relations Act is, by reason of that illegality, a per se violation of the Sherman Act (Pet. App. 11a; *id.* at 26a, 33a (Sloviter, J., dissenting)). The antitrust laws were never intended as a collateral means for enforcement of the National Labor Relations Act; the latter Act is self-contained and establishes its own enforcement mechanisms. Moreover, the policy considerations underlying Section 8(e) are much broader than, and in many cases quite different

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[3] While the panel below did not find it necessary to decide whether the agreement at issue violated Section 8(e) (Pet. App. 11a n.5), the earlier en banc decision in *Muko I* would seem to require a finding of violation if the question were reached. See 609 F.2d at 1375.

[4] Muko's statement (Pet. 9) that such agreements "are of increasing occurrence" is purely ipse dixit.

from, the policies underlying the antitrust laws. The primary goals of the labor laws are to preserve the free choice of employees with respect to joining unions (*Connell Construction Co.* v. *Plumbers Local 100, supra*, 421 U.S. at 632), and to "promote industrial peace" by encouraging and regulating the collective bargaining process. See, *e.g.*, *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 401 (1952). The antitrust laws, by contrast, are designed solely to preserve and promote competition. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). Whether a per se or rule of reason analysis is applied, "the purpose of [the antitrust] analysis is to form a judgment about the competitive significance of the restraint" (*ibid.*). Since Congress in enacting the labor laws was motivated primarily by concerns other than the promotion of business competition, the legality vel non of an agreement under the labor laws should not control whether that agreement violates the antitrust laws. See, *e.g.*, *FMC* v. *Pacific Maritime Association*, 435 U.S. 40, 61 (1978).

The opinion below does not conflict with the decision of any other court of appeals. *Consolidated Express, Inc.* v. *New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979) (*Conex*), vacated, 448 U.S. 902 (1980), on remand, 641 F.2d 90 (3d Cir.), mandamus and prohibition denied *sub nom. In re International Longshoremen's Association*, 451 U.S. 905 (1981), on which petitioner primarily relies (Pet. 14), is in fact in accord with this decision. *Conex* expressly holds that a finding that conduct is violative of Section 8(e) and therefore not entitled to a labor exemption does not affect the separate issue of whether the antitrust legality of the challenged conduct should be determined pursuant to a per se or rule of reason analysis. 602 F.2d at 522.[5] The generalization

[5] The portion of the *Conex* opinion quoted by Muko (Pet. 14) was in response to the argument that a per se analysis should never be applied in a labor relations context. 602 F.2d at 523. The standards applied in finding a per se violation on the facts of that case were those articulated by this Court in *National Society of Professional Engineers* v. *United States*, *supra*. See 602 F.2d at 523. Moreover, even if there were a conflict, *Conex* is a Third Circuit decision, and this Court does not sit to resolve intra-circuit conflicts. *E.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

of the Sixth Circuit in *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767, 775 (1970), cert. denied, 402 U.S. 983 (1971), that any non-exempt union-employer agreement constitutes a per se antitrust violation is dictum, because it was unnecessary to the conclusion reached by the court. The facts of that case, moreover, are readily distinguishable from the facts of this case. There, the specific agreement held to be unlawful involved a group of large coal mining firms that sought to use a union agreement to eliminate competition with smaller coal mining companies. Such an agreement is of the type normally viewed to be unreasonably restrictive. See, *e.g.*, *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). The Sixth Circuit, furthermore, has now expressly refuted its *South-East Coal Co.* dictum by holding that the issues of labor exemption and antitrust liability are distinct. *James R. Snyder Co.* v. *Associated General Contractors of America*, 677 F.2d 1111, 1119 (6th Cir. 1982), petition for cert. pending, No. 82-148 (filed July 27, 1982). Finally, the Ninth Circuit decision cited by Muko (Pet. 15), *California State Council of Carpenters* v. *Associated General Contractors of California, Inc.*, 648 F.2d 527 (1980), cert. granted, No. 81-334 (Jan. 11, 1982), not only involves a substantially different factual situation than the present case,[8] but arose from a motion to dismiss for failure to state a cause of action. The court of appeals therefore had no occasion to and did not decide whether a per se violation was established.

b. Under conventional antitrust analysis, a category of agreements will be considered illegal per se only if experience or analysis shows that such agreements have significant anticompetitive potential and rarely have a substantial, legitimate justification. See *Arizona* v. *Maricopa County Medical Society*, No. 80-419 (June 18, 1982), slip op. at 9; *National Society of Professional Engineers* v. *United*

[8] In that case, the plaintiff carpenter unions alleged that a contractors' association conspired to coerce other employers not to use contractors or subcontractors who had entered collective bargaining agreements with the plaintiff unions. The conduct challenged, therefore, did not consist of an agreement between a single union and a single employer.

States, *supra*, 435 U.S. at 692; *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). While a "group boycott" is often considered a per se offense (*FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 250 (1968)), neither precedent nor policy supports Muko's contention that the agreement here at issue falls within that classification.

As this Court has noted, "[t]he generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 541 (1978). That case, however, dealt only with the question whether the conduct challenged therein constituted a "boycott" within the meaning of the McCarran-Ferguson Act; this Court expressly declined to decide whether any particular form of boycott was illegal per se. 438 U.S. at 542-543. Moreover, the weight of both legal and scholarly authority supports the view that the mere existence of an agreement not to deal is insufficient to compel a finding of per se illegality.[7] Indeed, this Court's opinions that have found "group boycotts" to be unlawful per se have consistently focused not on the mere existence of the challenged agreement but on the horizontal collaborative exercise of economic power, either by competitors of the target (see *United States* v. *General Motors Corporation*, 384 U.S. 127, 143-144 (1966)), or by his suppliers or customers (see *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-213 (1959); *Paramount Famous Corporation* v. *United States*, 282 U.S. 30, 41 (1930); *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600 (1914)).[8]

The existence of a horizontal combination of market power is relevant to both the anticompetitive and procompetitive potential of any economic conduct, and is therefore highly relevant to whether the conduct is of the type this Court has deemed unlawful per se. A horizontal combination enhances

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[7] See *e.g.*, L. Sullivan, *Antitrust* §§ 83-92 (1977); R. Bork, *The Antitrust Paradox* 330-346 (1978).

[8] L. Sullivan, *Antitrust*, *supra*, at § 91.

the market power of the conspirators for the purpose of obtaining leverage with a common supplier or customer, thereby increasing the likelihood of competitive harm. Moreover, interdependent conduct increases the likelihood that the conduct is indeed anticompetitive, and not just a reaction to competitive forces.[9] If, however, an individual retailer requests a wholesaler to maintain exclusive relations with him rather than a rival, the wholesaler's unilateral decision to continue relations with the more profitable retailer is not inherently unreasonable or anticompetitive, but instead may reflect a reasonable decision as to the best means of enhancing interbrand competition. See *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 421 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957).

This case bears little resemblance to the classic "group boycott" case where a refusal to deal results from an agreement among horizontal competitors to compel customers or suppliers to forego competitive alternatives. Even if the Trades Councils may be viewed as representing a group of workers seeking to exclude another group of workers from the market for Silver's patronage,[10] the challenged agreement did not result from any threat by union members collectively to withhold their services as employees, *i.e.*, to use their combined market power. Instead, the genesis of the agreement was the unions' success in convincing potential customers of Silver's not to patronize a restaurant built with

---

[9] We do not mean to imply that there are no circumstances in which an interdependent decision not to deal might confer sufficient economic benefits to warrant scrutiny under the rule of reason. See the discussion of *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970), in L. Sullivan, *Antitrust*, *supra*, at 258. Rather, the point is that the interdependence of the conduct lessens the likelihood that efficiency, rather than exclusion, is the intended and likely result of the concerted conduct.

[10] A contention that an agreement among one group of workers to exclude other workers from a labor market violated the antitrust laws would raise questions under Section 6 of the Clayton Act, 15 U.S.C. 17. See *Connell Construction Co.* v. *Plumbers Local 100*, *supra*, 421 U.S. at 625. For the reasons set forth in the text, however, it is unnecessary to address the implications of Section 6 in this case.

non-union labor. This success was not dependent on the concerted use of market power, but rather upon the reaction of Silver's management to consumer preference.[11]

It is equally significant that neither the customers involved nor Silver's acted in concert with anyone at their own respective economic levels. Muko has not claimed that any of Silver's potential customers were coerced or threatened; each, upon reading that Silver's contractor paid "'less than the established prevailing wages in the area'" (Pet. App. 3a) made his or her own decision whether to patronize Silver's. Nor was Silver's agreement with the Trades Councils shown to be contingent upon the adherence of its competitors. In sum, the agreement here does not appear to involve the

---

[11] According to James Patterson, former president of Long John Silver's, Inc. (C.A. App. 826a, 828a-829a):

> [A]fter the store opened, we got the report that the union was passing out leaflets to our customers that were driving on the lot.
>
> * * *
>
> Q. And did he tell you anything about the effect of this on your customers?
>
> A. Yes. He said it was working for the union in that the people, or many people were driving on to the lot and either backing up or driving through the lot and leaving.
>
> * * *
>
> A. I don't know when in time it occurred, except it was either during or shortly thereafter the incident of the handbilling, and after struggling with the decision about what to do, * * * but it was at that time we decided we would go with the union contractors in the Pittsburgh metropolitan area.
>
> Q. At the time you made that decision with Mr. Rosenthal, had you the advice of counsel?
>
> A. We had learned from our counsel in Cincinnati as well as our house people that we couldn't stop the union from handbilling as long as they were on public property, so to that extent, we knew that we couldn't prevent them from doing it.
>
> Q. You have testified that you reached a decision to use union contractors. Could you explain for us, please, the basis for that decision why you came to that?
>
> A. Well, it is very obvious, we felt like our business was going to be severely damaged by the activity of the union. I have explained already how critical our success was in this market, so we just couldn't take the risk of not being successful in this market by having customers driven away who were sympathetic to the union's position.

collective use of market power to exclude a competitor that characterizes the Court's previous decisions that have found group boycotts to be unlawful per se.

Under these circumstances, a rule of reason test appears to be applicable. Experience to date does not allow us to conclude that the challenged conduct was so destructive of competition and lacking in justification under almost all circumstances that it should be held unlawful per se under the antitrust laws.[12]

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[12] While the result reached by the court of appeals is correct for the reasons set forth above, not all of its rationale (Pet. App. 21a-23a) is beyond question. The per se rule focuses on the results of a specific class of agreements in the typical case, and once a class of agreements is held illegal per se, the intent of the parties and the effect of the agreement in a particular case are irrelevant. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 649 (1980); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). Thus, once the court decided that the agreement in this case did not fit into an existing class of per se illegal agreements, it would have been proper to analyze the evidence on those factors as part of its rule of reason analysis. The court's mode of analysis, however, reverses those steps. The court found that the agreement was not illegal per se because there was no evidence of anti-competitive intent or significant anti-competitive effect.

The court's reliance on the "procompetitive effect" of "Silver's gain[ing] a position in the * * * fast food market" (Pet. App. 22a) is also flawed. But for the cessation of the union's handbilling efforts, there is no reason to believe that Silver's enjoyed greater success in the restaurant business because it used union rather than nonunion contractors to build its outlets. If a restraint on Silver's growth was imposed by the union's handbilling, it would be anomalous to conclude that an agreement is procompetitive simply because it brings about a cessation of one party's restrictive conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY V. MUKO, INC.,

Petitioner,

v.

SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, LONG JOHN SILVER'S, INC., AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF PITTSBURGH, PENNSYLVANIA AND VICINITY,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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REPLY

Little of what the Solicitor General has written relates to whether the issue in this case is of sufficient scope and importance to justify the Court's attention. Rather, the Solicitor General's primary argument is that the Court should not review this case because the decision of the court of appeals is correct. Actually, the comments on both questions in the numbered paragraphs of the Solicitor General's discussion support review.

1. As a result of the *Connell* decision, it "seems" to the Solicitor General "unlikely that the unions will often seek such agreements in the future . . ." (Brief at 6). It is therefore said that the issue is unlikely to recur with great frequency (Brief, at 5).

Although there are no statistics on the matter, *amicus* Associated Builders and Contractors, Inc., a national trade association of approximately 17,000 construction companies and distributors of construction supplies, states that in 1981 it received frequent reports of instances where contractors were told they were ineligible for work because they were non-union (*Amicus* Brief, at 9). The number of recent reported cases involving the same issue also leads one to believe that the practice is flourishing.[1] And Muko still maintains that it is fair to assume that a decrease in available construction projects in a struggling economy inevitably leads to increased efforts to exclude non-union contractors.

Even if one could safely predict that this precise factual pattern would never arise again, a critical aspect

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1. *See, e.g., Frito-Lay Inc. v. Retail Clerks Union Local No. 7*, 629 F.29 653 (10th Cir. 1980); *Cable News Network, Inc. v. Am. Broadcasting, ETC.*, 528 F.Supp. 365 (N.D. Ga. 1981); *James Julian, Inc. v. Raytheon*, 499 F.Supp. 949 (D. Del. 1980).

of the issue presented for review is determining what type of boycott conduct triggers *per se* treatment. Is a *per se* offense only present when there has been a "horizontal collaborative exercise of economic power" (Brief, at 9), as the Solicitor General believes, or should the *per se* rule apply to some wider range of boycotts as was again recently held in the Sixth and Eighth Circuits. *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982); *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982). Litigants and the lower courts have had varied answers to this issue since *Klor's* was decided more than twenty years ago.[2] In fact, the Court recently acknowledged the continuing nature of the controversy in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 542 n. 14 (1978). The pressing need for guidance on this issue is alone reason to grant review.

Because of *Connell*, it also "seems" to the Solicitor General that firms affected by the kind of exclusionary agreement present here will not "lack a prompt remedy ... under the labor laws" (Brief, at 6). Ironically, the *Connell* decision itself makes clear that the availability of a remedy under the labor laws is irrelevant to the issue of antitrust remedies. *Connell Const. Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 634 (1975). More importantly, Muko and all similarly placed contractors have no damage remedy under the labor laws because the agreement is voluntary and therefore does not come within §303 of the NLRA. 29 U.S.C. §187. That is why even the dissent in *Connell* stated that circumstances like

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2. Hills, *Antitrust Adviser and Edition*, 1981 Cum. Supp. §1.32; Van Cise, *The Future of Per Se in Antitrust Law*, 50 Va. L. Rev. 1165 (1964); Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 Va. L. Rev. 1165 (1959).

those present here "might well" give rise to a valid antitrust claim. 421 U.S. at 649 n. 9.

2. a. Muko does not now, and has never argued that the agreement in this case should be held a *per se* violation solely because it violates §8(e) of the NLRA. 29 U.S.C. §158(e). Whether or not a business practice will be classified as a *per se* offense depends in part upon past experience with the practice. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

The reason Muko cites §8(e) and its legislative history is that they represent a very important part of the past experience with conduct similar to defendants. One of the reasons Congress decided that labor boycott agreements should be illegal is that they lack redeeming value and have severe adverse economic consequences. In this case, for example, the only procompetitive effect ever offered to justify defendants' agreement is one the Solicitor General agrees should not be considered (Brief, at 12, n. 12).

The Solicitor General distinguishes *California State Council of Carpenters v. Associated General Contractors of California, Inc.*, 648 F.2d 527 (1980), *cert. granted*, No. 81-334 (Jan. 11, 1982) on the ground that the challenged conduct there did not consist of an agreement between a single union and single employer (Brief at 8, n. 6). As noted, whether that distinction makes any real difference is one of the issues in this case that should be decided. The recent case of *National Electrical Contractors Ass'n. v. National Contractors Ass'n.*, 678 F.2d 492 (4th Cir. 1982), *reh. denied*, (Sept. 9, 1982) supports application of a *per se* test in the labor context without focusing on whether a horizontal combination or a horizontal impact has occurred. Instead, critical analysis was directed at the anticompetitive nature of the

agreement itself, which was found to lack any concern for an increase in efficiency. *Id.* at 500. There is a direct conflict between the analysis of the Fourth Circuit in that case and the analysis of the Third Circuit in this case.

b. The Solicitor General's final argument is that defendants' agreement does not meet conventional requirements for a *per se* antitrust violation (Brief, at 8). The argument is based on the belief that the most important conventional requirement is the presence of the "horizontal collaborative exercise of economic power." That is not and should not be the deciding factor. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19 (1979); *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982); *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982). It is defendants' success in enlisting the cooperation of a mutual supplier, not other competitors, that makes the refusal to deal an effective weapon. *Battle*, 673 F.2d at 990. Herein lies the fundamental conflict that separates the decision of the Third Circuit from other courts of appeal.

In characterizing conduct under the *per se* rule, this Court has held that the focus should be on whether the effect and purpose of the practice are to threaten the proper operation of our predominately free-market economy. *Broadcast Music*, 441 U.S. at 19. If there is no purpose except stifling competition, the *per se* rule should apply. 441 U.S. at 20. The appropriate criteria for determining whether the *per se* test should apply is whether some plausible likelihood exists that the arrangement has an efficiency creating potential. If not, *per se* illegality is appropriate. Hills, *Antitrust Adviser and Edition*, 1981 Cum. Supp. §1.32.

The Trade Councils lacked the ability to impose their desire to obtain and hold jobs for their members. They

therefore enlisted the aid of Silver's to implement and enforce an agreement which acted as a direct restraint on the business market. The agreement had the effect of stamping out existing competition. The purpose and effect of the agreement was to eliminate not increase competition. *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982). None of the considerations in an exclusive dealing arrangement are present, since no single union contractor was chosen to construct all of Silver's facilities. And as previously noted, not even the Solicitor General has been able to proffer a justifiable procompetitive effect of this agreement (Brief, at 12 n. 12).

Without any procompetitive justification, defendants' agreement is a naked restraint on competition. It is the classic case which merits *per se* treatment. A decision that the *per se* rule is applicable to an agreement entered into outside the non-statutory labor exemption and in violation of specific labor law policy will effectuate business certainty and litigation efficiency, while at the same time fulfilling federal labor policy without diluting enforcement of federal antitrust policy. *See e.g., Arizona v. Maricopa County Medical Society*, ___ U.S. ___ 50 LW 4687 (No. 80-419, June 18, 1982). This Court should take the opportunity to definitively decide these important issues.

CONCLUSION

Muko's petition provides this Court with the opportunity to resolve the continuing controversy over the definition of a *per se* illegal boycott. For the reasons described herein and in Muko's petition, a writ of certiorari should issue to review the judgment and opinions of the Third Circuit.

Respectfully submitted,

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On Petition For a Writ of Certiorari To The United States Court of Appeals For The Third Circuit At Nos. 81-1696, 1697, 1698

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ANSWER TO BRIEF AMICUS CURIAE

The Associated Builders and Contractors, Inc. ("ABC"), an association of non-union building contractors, has proffered to this Court an *amicus curiae* brief in support of Larry V. Muko, Inc.'s petition for certiorari. This brief purports to identify questions of national significance presented by the Third Circuit decision in this case.

ABC's claims of nationwide impact ignore and are contrary to the record. The following table compares ABC's two principal claims with the record:

ABC's Claim	*The Record*
1. The agreement between respondents has a "devastating anticompetitive impact . . . for all non-union contractors including the ABC membership." P. 5.	Larry V. Muko could not identify a single other non-union general contractor affected by the alleged agreement (420a), and no such contractor is anywhere identified in the record. Non-union subcontractors were free to and did participate in Silver's construction projects. 884a-885a; 1061-1062a. Muko itself had higher sales after 1973, when the agreement was reached, than before and had higher gross profits every year after 1973 than before. 127a. Muko built all Pittsburgh area Pizza Hut restaurants for 1973 until trial and

ABC's Claim	*The Record*
	most Kentucky Fried Chicken restaurants. 431a; 654a-655a; 118a.
2. "[T]he challenged practices are continuing and of nationwide scope." P. 10.	The jury made no finding that the agreement was continuing. Indeed, one contractor used by Silver's in the Pittsburgh area was not even known to the respondent Building Trades Councils. 1053a; 1041a. Although the alleged agreement called for further contacts among respondents, there were none after 1973. 831a; 928a-929a; 1041a-1060a; 1365a. Petitioner presented no evidence of other agreements to exclude non-union contractors from any building construction, and Larry V. Muko knew of no such agreements. 400a. Larry V. Muko acknowledged that certain building owners decided unilaterally to use only union contractors. 428a-430a. Silver's currently uses both union and non-union contractors to build its

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restaurants in certain areas. 958a. Without any action by unions, but as a result of independent business decision, Silver's uses only union contractors in certain other markets. 957a; 1368a.

Other facts advanced by ABC are contrary to the findings of the jury and of the Third Circuit. ABC's statement that respondents' agreement had nothing to do with increasing competition in the restaurant market (p. 5 & 5 n.4) was argued by Muko but rejected by both the jury, applying rule of reason principles, and the Third Circuit. Petition at pp. 22a-23a. ABC's statement that Silver's is a "large restaurant chain" (pp. iii & 10) is contrary to the presumptive conclusion of the jury that Silver's was an insignificant participant in any proper construction market and the view of the Third Circuit that Silver's is a "small retailer." Petition at 21a.

In short, ABC can advance its silk purse of an argument only by ignoring that the record, for its purposes, is a sow's ear.

ABC also misstates the legal reasoning of the Third Circuit when it states that the Third Circuit confined the *per se* rule "to horizontal boycotts where competitors seek to exclude other competitors from the marketplace . . ." P. 8. This was not the holding of the court below. It is true that a boycott involving one competitor and targeting another competitor is illegal in the Third Circuit. But that court would also apply a *per se* rule to any coercive combination among two or more competitors to boycott a third party, regardless whether that third party

is a competitor. Petition at 20a. It would also apply the *per se* rule to any other conduct that, based upon the collective experience of the courts, is inherently anticompetitive and without redeeming competitive value. *Id.* The Third Circuit simply held that the facts proven by Muko here did not bring this case within that category of restraint.

CONCLUSION

For the foregoing reasons, as well as those stated in Silver's principal Brief, the petition for certiorari should be denied.

Respectfully submitted,

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